TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 52

SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

EDWARD WALTERS, A MINOR, BY HERMAN WALTERS, HIS FATHER AND NEXT FRIEND

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 20, 1931

CERTIORARI GRANTED MAY 4, 1931

(35,821)

(35,821)

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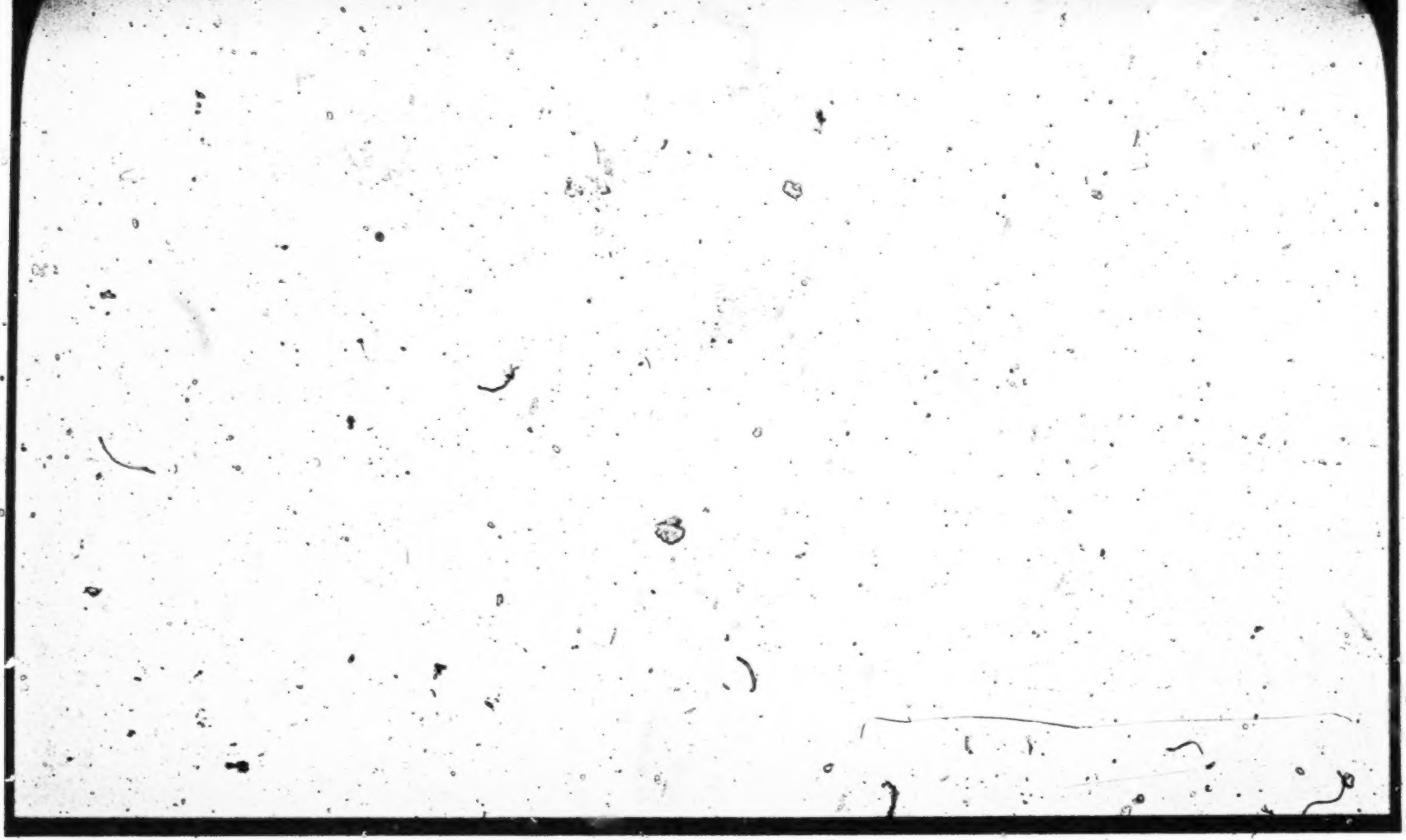


[fol. a] [Caption omitted]

[fol. 1] Citation, in usual form, showing service on Edward Walters, filed February 4, 1930, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI, DIV. No. 1

No. 8483

EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

NOTICE OF APPEAL—Filed Feb. 4, 1930

To the above-named plaintiff, Edward Walters, a minor, by Herman Walters, his father and next friend, or Louis E. Miller, attorney of record:

You are hereby notified that the defendant appeals from the judgment entered in the above entitled cause in favor of the plaintiff and against the defendant, the Southern Railway Company, entered on the 10th day of December, 1929.

Southern Railway Company, by Kramer, Kramer & Campbell, R. E. Costello, Samuel B. McPheeters, Its Attorneys.

Received copy of above notice this 4 day of Feb., 1930.
Louis E. Miller, Attorney for Plaintiff.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD ENTRY OF FILING OF TRANSCRIPT ON REMOVAL—Feb. 11, 1929

Now on this day comes defendant in the above entitled cause and files herein a transcript of the record on removal of said cause from the Circuit Court, City of St. Louis, Missouri.

[fol. 3] IN CIRCUIT COURT OF CITY OF ST. LOUIS

In the Matter of 137,954B: EDWARD WALTERS

ORDER APPOINTING HERMAN WALTERS AS NEXT FRIEND TO EDWARD WALTERS, AN INFANT—January 18, 1929

Upon petition this day filed by Herman Walters, father of Edward Walters, an infant under the age of fourteen years, it is ordered by the Court that Herman Walters be and he is hereby appointed next friend for said infant for the purpose of instituting suit in this Court against the Southern Railway Company, a corporation, to recover damages; thereupon, said Herman Walters consents to act as such next friend, which consent is annexed to said petition.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

APPLICATION FOR APPOINTMENT OF NEXT FRIEND

The petition of Herman Walters represents that he is the father of Edward Walters, an infant under the age of seven years, resides with your petitioner and that said minor has no legally appointed guardian, and that he desires to institute and prosecute a suit for damages against the Southern Railway Company, a corporation, growing out of injuries sustained by him on or about the 3rd day of March, 1927, and petitioner prays the Court to appoint him

as the next friend of said minor for the purpose of instituting and prosecuting this suit.

Louis E. Miller, Atty. for Petitioner.

I, Herman Walters, in the above petition named, consent and am willing to serve as the next friend for the above named minor for the purpose of instituting and prosecuting suit.

Herman Walters,

[fol. 4] *Duly sworn to by Herman Walters. Jurat omitted in printing.*

IN CIRCUIT COURT OF CITY OF ST. LOUIS

EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

PETITION—Filed Jan. 18, 1929

Comes now Edward Walters, a minor, by Herman Walters, his father and next friend, and states that defendant is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of law with an office and place of business located in the City of St. Louis, Missouri, and is and at all the times hereinafter mentioned was engaged in the operation of a [fol. 5] certain railroad hereinafter mentioned, and owned and controlled the railroad tracks and equipment hereinafter referred to and located in the City of East St. Louis, Illinois. Plaintiff further states that Bond and Trendley Avenues are and at all the times hereinafter mentioned were open and public highways in the said city and state, and that the defendant owned and operated the said line of steam railroad which crossed the intersection of said streets; and that the defendant was in possession and control of and operated a certain train or cut of cars over and along said tracks and across said Bond Avenue; that on the 3rd day of March, 1927, the plaintiff was a pedestrian

on the sidewalk adjacent to said street, and while in the act of walking across the said tracks, and while exercising due care for his own safety, defendant, by and through its agents and servants and employees, while in the course of their employment and in the furtherance of defendant's business, operated and ran a certain engine with a cut of cars attached thereto across the place aforesaid, and as a direct and proximate result thereof struck and ran over the plaintiff, causing him to sustain serious and permanent injuries over his entire body.

Wherefore, plaintiff prays judgment against defendant in the sum of $65,000, together with the costs of this suit.

Louis E. Miller, Attorney for Plaintiff.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

SUMMONS AND SHERIFF'S RETURN

STATE OF MISSOURI,
City of St. Louis, ss:

The State of Missouri to the sheriff of the city of St. Louis, Greeting:

We command you to summons:—Southern Railway Company, a corporation, to appear before the Judges of our Circuit Court, on the first day of the next term thereof, to be held in the City of St. Louis, at the Court House in said City, on the first Monday of February next, then and there [fol. 6] to answer the complaint of Edward Walters, a minor, by Herman Walters, his father and next friend, as set forth in the annexed petition; and have you then and there this writ:

Witness John Schmoll, Clerk of our said Court, with the seal thereof hereto affixed, at office in the City of St. Louis, this 19th day of January in the year of our Lord, nineteen hundred and twenty-nine.

John Schmoll, Clerk. (Seal.)

Served this writ in the City of St. Louis, Missouri, on the within named defendant the Southern Railway Co. (a corporation), this 19th day of January 1929 by delivering a

copy of the writ and petition as furnished by the Clerk to A. O. Kohler (Chf Clk) of the said defendant corporation, he being in said defendants usual business office and in charge thereon. The President or other Chief Officer of said Defendant, could not be found in the City of St. Louis at the time of service.

George W. Strodtman, Sheriff, by John Zumsteg, Deputy.

Fee $1.00.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

[Title omitted]

ORDER REMOVING CAUSE TO FEDERAL COURT—Feb. 5, 1929

Now at this day comes the defendant by its attorneys and files and submits to the Court a notice and verified petition praying for an order removing this cause to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri; and also presents to the Court its bond, conditioned according to law, in the penal sum of Five Hundred ($500.00) Dollars with the United States Fidelity and Guara[illegible] Company, as surety; and the Court having seen and ex[illegible]ined said petition and bond, and being satisfied that written notice of said petition and bond for removal has been given the adverse party to this suit, prior to filing the same, doth accept said petition and bond and doth order that said bond be approved and filed, which is done, that the prayer of said petition be [fol. 7] granted, and that the Clerk of this Court forthwith certify for entering in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, a copy of the record in the above entitled cause, as fully as the same remains on file and of record in this Court; that no further proceedings be had in this suit in this Court.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

NOTICE OF PETITION FOR REMOVAL

To Edward Walters, a minor, by Herman Walters, his father and next best friend, and Louis E. Miller, his attorney:

You and Each of You are hereby notified that the Southern Railway Company, a corporation, defendant in the above entitled cause, intends to file in said cause, and call up for hearing at 10 A. M., Tuesday, February 5th, 1929, Div. No. 1 a petition and bond for removal of said cause from the Circuit Court of the City of St. Louis, Missouri, to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Dated this 2nd day of February, A. D. 1929.

Southern Railway Company, by Kramer, Kramer & Campbell, Saml. R. McPheeters, Its Attorneys.

Received notice, of which the above is a true and correct copy, this 2 day of February A. D. 1929.

Edward Walters, a Minor, by Herman Walters, His Father and Next Friend, by Louis E. Miller, His Attorney.

IN CIRCUIT COURT OF CITY OF ST. LOUIS

PETITION FOR REMOVAL OF CAUSE TO FEDERAL COURT

To the Honorable Judges of the Circuit Court of the city of St. Louis, Missouri:

The petitioner, Southern Railway Company, defendant in the above entitled cause, respectfully shows unto the Court that this is a suit now pending in this Court, in which the said Edward Walters, a minor, by Herman Walters, his father and next friend, is plaintiff, and the Southern Railway Company, a corporation is defendant, the place of trial [fol. 8] being in the Circuit Court of the City of St. Louis, Missouri, aforesaid.

That this suit was commenced on or about the 19th day of January, A. D. 1929; that neither the time fixed by the

laws of the State of Missouri nor the rules of this Court within which this petitioner is required to plead, answer or demur herein, has yet expired.

That this is a suit of a civil nature and is brought to recover the alleged damages occasioned to the plaintiff by the alleged negligence of this petitioner.

That the matter in dispute exceeds, exclusive of all interest an dcosts, the sum and value of Three Thousand Dollars ($3,000.00), and that this defendant is actually interested in the controversy in this suit.

That this action involves a controversy wholly between citizens of different states; that the said Edward Walters, at the time of the commencement of this suit, did, ever since has and does still reside in the State of Illinois; that at the time of the commencement of this suit, the said Edward Walters was, ever since has been and now is a citizen of the State of Illinois; that the said Herman Walters, at the time of the commencement of this suit, did, ever since has and still does reside in the State of Illinois; that at the time of the commencement of this suit, the said Herman Walters was, ever since has been and now is a citizen of the State of Illinois.

That at the time of the commencement of this suit the defendant, Southern Railway Company, was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Virginia; that the defendant herein, Southern Railway Company, at the time of the commencement of this suit was not, has not since been and is not now a citizen of the State of Illinois; that the defendant herein, Southern Railway Company, at the time of the commencement of this suit was not, has not been and is not now a corporation of the State of Illinois; that the defendant herein, Southern Railway Company, at the time of the commencement of this suit was not, has not since been and is not now a resident of the State of Illinois; that the defendant herein, Southern Railway Company, at the time of the commencement of this suit was not, has not since been and is not now a corporation of the State of Missouri; that the defendant herein, Southern Railway Company, at the time of the commencement of this suit was not, has not since and is not now a resident of the State of Missouri; [fol. 9] that the defendant herein, Southern Railway Com-

pany, at the time of the commencement of this suit was not, has not since been and is not now a citizen of the State of Missouri.

Your petitioner offers herewith a bond, with good and sufficient surety, for entering in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in this suit, and for the payment of all costs that may be awarded by the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, if the said District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner further represents that written notice of this petition and bond for removal has been given the adverse party thereto prior to the filing of this petition and bond for removal (as will more fully appear by the written notice hereto attached, marked Exhibit "A" and made a part of this petition, and the written acknowledgment of service thereon.)

Your petitioner prays this Honorable Court to proceed no further herein, except to make such order of removal as is required by law, and to accept said bond and surety, and to cause the record herein to be removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

And your petitioner will ever pray, etc.

Southern Railway Company, by Kramer, Kramer & Campbell, Saml B. McPheeters, Its Attorneys.

Duly sworn to by Samuel B. McPheeters. Jurat omitted in printing.

[fol. 10] Subscribed and sworn to before me this 24th day of January, A. D. 1929. My commission expires May 11th, 1931. Wilder Lucas, Notary Public. (Seal.)

Bond on removal for $500.00, approved February 5, 1929, omitted in printing.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF ANSWER—March 6, 1929

Now on this day comes defendant in the above entitled cause and files herein its answer to the petition of plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Mar. 6, 1929

Comes now defendant, Southern Railway Company, and for answer to plaintiff's petition herein denies each and every allegation therein contained.

Wherefore, having fully answered defendant, Southern Railway Company, prays to be hence dismissed with its costs.

Kramer, Kramer & Campbell, Sam'l B. McPheeters,
Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF AMENDED PETITION—
April 24, 1929

Now on this day comes plaintiff in the above entitled cause, and by leave of Court, files herein his amended petition.

IN UNITED STATES DISTRICT COURT

AMENDED PETITION—Filed Apr. 24, 1929

Comes now Edward Walters, a minor, by Herman Walters, his father and next friend, and states that his father, Herman Walters, was by the Circuit Court of the City of St. Louis, Missouri, duly appointed as his next friend for

the purpose of instituting and prosecuting this suit, and that said next friend has duly consented to act as such.

Plaintiff states that the defendant is and was at all the times hereinafter mentioned a corporation duly organized and existing and engaged in the operation of a railroad line [fol. 13] in the City of East St. Louis, Illinois, and was engaged as a common carrier of passengers and freight for hire at all the times hereinafter mentioned.

Plaintiff states that on or about March 3, 1927, the defendant owned, maintained, and operated a line of railroad tracks in the City of East St. Louis, Illinois, and that said railroad tracks crossed Bond Avenue, a certain public street and highway in the City of East St. Louis, Illinois; that on said date the defendant was in possession and control of and operating a certain train and cut of cars on, over and along said track and across said Bond Avenue; that on said date the plaintiff, a child about six years of age, was a pedestrian in said street and was in the act of walking across said track; that it was then and there the duty of defendant to exercise reasonable care and caution for the safety of the plaintiff; that disregarding its duty in this behalf the defendant on said date so negligently and carelessly ran, managed, operated, and controlled said train on, over and along said tracks and across Bond Avenue that it struck, collided with, ran upon and against the plaintiff as he was in the act of crossing said track, and so injured him that his right leg thereafter was necessarily amputated and a part of his left foot also necessarily amputated; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels, and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, torn, bruised, and injured and the functions thereof impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered and has so remained up until the present time; that he has suffered bodily and mental anguish by reason of said injuries, and will continue so to suffer in the future, and has by reason of said injuries expended and necessarily incurred great liability and indebtedness in endeavoring to be cured of his said injuries; that because of said injuries he has been unable to play and enjoy the usual activities of

children of his age; and that he will in the future be unable to work at gainful occupations, and that accordingly his ability to earn money and support himself is and has been permanently impaired and diminished; plaintiff averring that all of the aforesaid injuries are permanent.

Plaintiff states that all of the aforesaid injuries are and were the result of the carelessness and negligence of the defendant in the following particulars, to-wit:

[fol. 14] 1. That defendant carelessly and negligently ran, operated, and propelled said train on, over and along said track and across Bond Avenue without sounding any warning bell or other signal of the approach of said train to said public highway contrary to and in violation of the laws of the State of Illinois relative thereto.

2. That the defendant carelessly and negligently ran, operated and propelled said train on, over and along said track and across Bond Avenue without keeping any lookout or any proper and sufficient lookout so as to have discovered the presence of the plaintiff in the act of crossing said track.

3. That the defendant's fireman and engineer, and other servants then and there in charge of and operating said train saw, or by the exercise of reasonable care could have seen, the plaintiff approaching said track on which said train was being operated across Bond Avenue in time by the exercise of reasonable care and with safety to themselves and other occupants and passengers on said train to have stopped said train, slowed down the speed thereof in time to have permitted plaintiff to have gotten across the track, or to have rung a bell, sounded a whistle or given other warning calculated to bring plaintiff to a realization of his peril in time to have permitted plaintiff to reach a position of safety and thereby have avoided being struck by said train.

Plaintiff states that each and every one of the aforesaid specifications and assignments of negligence separately and collectively caused and contributed to plaintiff's injuries.

Plaintiff for another assignment of negligence states that for a long time prior to March 3, 1927, the laws of the State of Illinois in full force and effect provided for the creation

and organization of the Illinois Commerce Commission and prescribed certain rights and duties by said commission to be performed; that on the date aforesaid, to-wit: March 3, 1927, and for a long time prior thereto, said Illinois Commerce Commission was in existence and acting under and by virtue of the laws of Illinois; that by virtue of said authority vested in said Commission said Commission on to-wit, October 20, 1926, entered a certain order directing and commanding the defendant (if and when said defendant discontinues its former practice of maintaining a crossing watchman at said Bond Avenue and crossing gates on said Avenue where said tracks cross) to thereafter "Protect said crossings by requiring all of its trains before passing over said crossings to come to a stop, and to [fol. 15] require one of the crew of said trains to flag said crossings, and warn all persons, attempting to cross said crossings, of the approach of said trains."

Plaintiff states that on to-wit March 3, 1927, and prior thereto the defendant had discontinued maintaining and keeping a crossing watchman and crossing gates at said Bond Avenue crossing, and that the above-quoted order of said Commission was on said date, to-wit March 3, 1927, in full force and effect, and that it was then and there the duty of the defendant to exercise due care and caution for the safety of plaintiff as in said order provided, but that disregarding its duty in this behalf the defendant on said date carelessly and negligently and unlawfully ran, managed, operated, and controlled the said train on, over and along one of said tracks and across said Bond Avenue without requiring and bringing said train to a stop, and without requiring any of the crew of said train to flag said crossing and to warn the plaintiff, who was at said time attempting to cross said tracks of the approach of said train contrary to and in violation of the aforesaid order of said Illinois Commerce Commission; that by reason of defendant's said negligent, careless and unlawful acts and omissions said train struck and ran upon and against the plaintiff and injured him as hereinbefore set out.

Wherefore, plaintiff prays judgment against defendant in the sum of $65,000.00, together with the costs of this suit.

Louis E. Miller, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING OF AMENDED ANSWER TO AMENDED PETITION—May 14, 1929

Now on this day comes defendant in the above entitled cause and, by leave of Court, files herein its amended answer to amended petition of plaintiff.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER TO PLAINTIFF'S AMENDED PETITION—Filed May 14, 1929

Comes now defendant, Southern Railway Company, and for amended answer to plaintiff's amended petition filed herein denies each and every allegation therein contained. [fol. 16] Wherefore, having fully answered defendant, Southern Railway Company, prays to be hence dismissed with its costs.

Kramer, Kramer & Campbell, Sam'l B. McPheeters,
Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

JURY EMPANELLED; TRIAL—November 13, 1929

Now comes the parties by their respective attorneys and this cause having been heretofore set for trial on this day, both sides announce ready, and comes also the following jury, to-wit, Wilford Via, Charles Haeberle, G. W. Henry, Wilmer Kessling, Peter S. Mertens, Harry Wagner, Charles Blackmore, Louis Larsen, Jos. Vogelweid, Otto Ziesse, Henry Radle, William J. O'Connor, twelve (12) good and lawful men who having been duly drawn, summoned and chosen are now sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence; and now the introduction of the evidence in chief in behalf of plaintiff is commenced, but not being con-

cluded at the hour of adjournment, it is Ordered that further proceedings on trial of said cause be postponed until tomorrow at ten o'clock A. M.

In United States District Court

Trial, November 14, 1929; Motion of Defendant for Directed Verdict and Overruling Thereof

Now again come the parties by their respective attorneys and comes also the jury heretofore empaneled and sworn herein; whereupon, the introduction of the evidence in chief in behalf of plaintiff is resumed and concluded. And now defendant files its motion for a directed verdict herein at the close of plaintiff's case in chief, which said motion is submitted to the Court, and by the Court, after due consideration thereof, overruled. And now the introduction of evidence in behalf of defendant is commenced and concluded, and now defendant files herein its motion for directed verdict in its favor at the close of all the evidence, which said motion is submitted to the Court, and by the Court, after due consideration thereof, overruled. And [fol. 17] now the arguments of counsel for the respective parties are commenced and concluded. Hour of adjournment having arrived, it is Ordered that further proceedings on the trial of this cause be postponed until tomorrow at ten o'clock A. M.

In United States District Court

Trial, November 15, 1929; Verdict and Judgment

Now again come the parties by their respective attorneys and comes also the jury heretofore empaneled and sworn herein to try the issues herein joined, and the jury having heard the arguments of counsel for the respective parties, and being now duly charged and instructed by the Court, retires to consider of its verdict herein, which it afterwards returns in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

#8483. At Law

EDWARD WALTERS, a minor, by Herman Walters, his Father and Next Friend, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

Verdict

We, the jury in the above entitled cause, find the issues herein joined in favor of plaintiff, Edward Walters a Minor, by Herman Walters, his father and next friend, and assess the damages of said plaintiff in the sum of Forty Three Thousand Dollars ($43000.00).

(Signed) Wm. J. O'Connor, Foreman.

November 15th, 1929.

It is therefore, pursuant to the finding and verdict of the jury as aforesaid Ordered and Adjudged that plaintiff, Edward Walters, a minor, by Herman Walters, his father and next friend, have and recover of defendant, Southern Railway Company, a corporation, the sum of Forty Three Thousand Dollars ($43,000.00) as his damages herein so found and assessed by the jury, together with his costs and charges herein expended, for all of which judgment, costs and charges let execution issue in behalf of plaintiff against said defendant upon præcipe filed therefore by said plaintiff.

(Verdict filed.)

[fol. 18] IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF FILING MOTION FOR NEW TRIAL—NOV. 16, 1929

Now comes defendant and files herein its motion for a new trial.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed Nov. 16, 1929 —

Now on this day, and within four days after the rendition of the judgment and verdict hereinafter mentioned, comes the defendant and moves the Court to set aside the verdict rendered in said cause on the 15th day of November, 1929, and the judgment thereon, and to grant it a new trial therein for the following reasons:

1. The verdict is so manifestly against the evidence and the weight of the evidence, that it shows it was the result of sympathy for plaintiff, and of passion and prejudice against the defendant.

2. The verdict of the jury is so grossly excessive that it shows it was the result of passion and prejudice.

3. The verdict of the jury shows that it is the result of bias, passion and prejudice on the part of the jury.

4. The verdict of the jury is excessive.

5. The verdict is against the law.

6. The verdict is against the law under the evidence.

7. There is no substantial evidence to support the verdict.

8. The Court erred in admitting incompetent, irrelevant and immaterial testimony and evidence offered by the plaintiff and over the objection of the defendant.

9. The Court erred in rejecting competent, relevant and material evidence offered by the defendant.

10. The Court erred in refusing to give the jury an instruction in the nature of a demurrer to the evidence at the close of plaintiff's case as requested by the defendant.

11. The Court erred in refusing to give to the jury an instruction in the nature of a demurrer to the evidence at [fol. 19] the close of all the evidence in the case requested by the defendant.

Kramer, Kramer & Campbell, Sam'l B. McPheeters,
Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER DIRECTING PLAINTIFF TO REMIT $15,000.00 OR MOTION FOR NEW TRIAL WILL BE GRANTED—Dec. 2, 1929

Now comes the parties by their respective attorneys and argue and submit to the Court the motion of defendant for a new trial, and the Court, after due consideration, doth Order that such motion be, and the same is hereby sustained, unless plaintiff within ten days from this date file a remittitur in the sum of $15,000.00, thereby reducing the amount of the judgment herein to the sum of $28,000.00, in which event the motion will be overruled.

IN UNITED STATES DISTRICT COURT

REMITTITUR ENTERED, JUDGMENT REDUCED, AND MOTION FOR NEW TRIAL OVERRULED—Dec. 10, 1929

Now, plaintiff in open Court voluntarily remits the sum of Fifteen Thousand Dollars ($15,000.00) to defendant from the assessment of damages in his favor by the jury on the trial of this cause, thereby reducing the amount of judgment herein to the sum of Twenty Eight Thousand Dollars ($28,000.00); whereupon it is Ordered that the motion of defendant for a new trial be, and the same is hereby, overruled.

IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS—December 20, 1929

Now, on application, it is Ordered that defendant be, and it is hereby, granted sixty days from and after this date within which to file its bill of exceptions herein.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF ISSUING OF CITATION, ETC., BILL OF EXCEPTIONS APPROVED AND ALLOWED—Feb. 4, 1930

Now, a citation is issued and filed, directed to plaintiff, citing and admonishing him to be and appear in the United [fol. 20] States Circuit Court of Appeals for the Eighth Circuit within sixty (60) days from and after this date. And now defendant files herein its praecipe for transcript of the record on said appeal, bearing acknowledgment of service by attorney for plaintiff. And now defendant presents its bill of exceptions, which said bill of exceptions is allowed, approved, signed, filed and made a part of the record herein.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Feb. 4, 1930

To the Honorable Charles B. Faris, judge of said court:

And now comes Southern Railway Company, a corporation, defendant in the above entitled cause, by Kramer, Kramer & Campbell, R. E. Costello and Samuel B. McPheeters, its attorneys, and feeling itself aggrieved by the verdict and judgment entered herein on the 10th day of December, A. D. 1929, hereby prays that an appeal may be allowed to it from the said judgment to the United States Circuit Court of Appeals for the 8th Circuit, and in connection with this petition and said appeal said defendant, the petitioner herein, herewith presents its assignment of errors.

Petitioner further prays that an order of supersedeas may be entered herein, pending the final disposition of the cause and that the amount of security and the conditions thereof may be fixed by the order allowing this appeal, and that citation may issue, as provided by law.

Sam'l B. McPeeters, R. E. Costello, Kramer, Kramer & Campbell, Attorneys for Defendant.

In United States District Court

Assignment of Errors—Filed Feb. 4, 1930

And now comes the Southern Railway Company, defendant in the above entitled cause, by Samuel B. McPheeters, R. E. Costello and Kramer, Kramer & Campbell, its attorneys, and says that in the record, proceedings, verdict and judgment in the above entitled cause, which said judgment was entered on or about the 10th day of December, A. D. 1929, there are manifest errors which operated to the prejudice of the defendant in said cause in this:

[fol. 21] First. That District Court erred, during the cross examination by defendant of James Goodwin, a witness for plaintiff, in refusing to permit the said witness, James Goodwin, to answer a material, competent, proper and relevant question then put to him on cross-examination by counsel for defendant, which said question so propounded to the said witness, the objection of counsel for plaintiff thereto, the ruling of the court thereon and the exception taken to the ruling of the court, are in words and figures as follows, to-wit:

"Q. Is Gene related to the Walters boy, do you know?

Mr. Miller: I submit, that is wholly immaterial to this proceeding, whether or not Gene was related to the Walters boy.

The Court: Well, probably not immaterial, but Mr. Gene, whatever his name may be, is not a witness, and I gather that the information this witness would have about it would probably be hearsay. It is certainly so now. Objection sustained.

To which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still continues to object and except."

Second. The District Court erred, during the cross-examination by defendant of Edward Walters, plaintiff, in refusing to permit the said Edward Walters, Plaintiff, to answer a material, competent, proper and relevant question then put to him on cross-examination by counsel for

defendant, which said question so propounded to the said Edward Walters, plaintiff, the objection of counsel for plaintiff thereto, the ruling of the court thereon and the exception taken to the ruling of the court, are in words and figures as follows, to-wit:

"Q. Now, from looking at the two pictures, Defendant's Exhibits Nos. 5 and 6', which one of them would you say represents the part of the engine that you saw there, that you say struck you?

Mr. Miller: Just a moment, if your Honor please. I submit, the question is unfair, to this extent: That he has not identified either the coal car or any particular part of this particular engine, as striking him.

Mr. McPheeters: That was not the question.

The Court: I think the objection ought to be sustained for another reason. He was not asked about any picture, [fol. 22] in his direct examination, and can not be cross-examined about that.

To which action and ruling of the court, defendants, by its counsel, then and there duly objected and excepted, and still continues to object and except."

Third. The District Court erred in refusing to give defendant's instruction in the nature of a demurrer to the evidence offered at the close of plaintiff's evidence in the case.

Fourth. The District Court erred in refusing to give and read to the jury the written request for an instruction in the nature of a demurrer to the evidence asked by defendant at the close of plaintiff's evidence in the case, which said instruction so offered and then and there refused by the Court is in words and figures as follows, to-wit:

"The Court instructs the jury that under the pleadings and the evidence adduced by plaintiff, your verdict should be for the defendant."

Fifth. The District Court erred in refusing to give defendant's instruction in the nature of a demurrer to the evidence offered at the close of all of the evidence offered in the case.

Sixth. The District Court erred in refusing to give and read to the jury the written request for an instruction in the nature of a demurrer to the evidence asked by defendant at the close of all of the evidence offered in the case, which said instruction so offered and then and there refused by the Court is in words and figures as follows, to-wit:

"At the close of all the evidence in the case the Court instructs the jury that under the law, the pleadings and the evidence, plaintiff is not entitled to recover, and your verdict must be for defendant."

Seventh. The District Court erred in overruling and denying defendant's motion for a new trial in this case, and in refusing to set aside the verdict and judgment herein, and in refusing to grant unto defendant a new trial as so requested and prayed by the defendant for the reason that after finding the facts found by the Court in its decision upon such motion, it then and there became and was the duty of the Court under such facts so found by it, in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judg-
[fol. 23] ment herein and to grant unto the defendant a new trial; and for the reason that under such facts so found by the Court in its decision aforesaid, the Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the Court in refusing and denying defendant's said motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion by the Court.

Eighth. The verdict and judgment in this cause, even after the remittitur filed by the plaintiff at the suggestion of the Court, are so grossly excessive as to show that the original verdict was the result of sympathy on the part of the jury and that the amount suggested by the Court, after he had suggested the remittitur, was still so grossly excessive as to show that it was not reduced further through sympathy on the part of the Court, and the action of the Court in refusing to grant a new trial, or in the alternative, if he felt that a new trial ought not to be granted, in not causing the judgment to be reduced further, was arbitrary and an abuse of sound judicial discretion by the Court.

Ninth. The verdict and judgment in this case, even after the remittitur filed at the suggestion of the Court, are so grossly excessive that to allow the judgment to stand for the amount of $28,000.00 after the remittitur suggested by the Court, constitutes an arbitrary action on the part of the Court and an abuse of its sound judicial discretion.

Tenth. The verdict and judgment of the Court in this case are not sustained by the evidence in this case, and there is not the quantum of evidence required under the rules of the Federal Court to sustain a verdict and judgment at all in favor of the plaintiff.

Eleventh. The verdict and judgment in this case are contrary to the clear weight of the evidence in this case.

Twelfth. The verdict and judgment in this case are contrary to the evidence in this case.

Thirteenth. The verdict and judgment in this case are contrary to the law in this case.

Fourteenth. The verdict and judgment are for a greater amount than is warranted by the evidence in this case, when the same is considered in the exercise of sound judicial discretion by the Court.

[fols. 24 & 25] Fifteenth. The District Court erred in entering judgment in this case in favor of plaintiff and against defendant.

Wherefore defendant, Southern Railway Company, prays that the said judgment of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri may be reversed.

Sam'l B. McPheeters, R. E. Costello, Kramer, Kramer & Campbell, Attorneys for Defendant.

Bond on appeal for $30,000, approved and filed February 4, 1930, omitted in printing.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Feb. 4, 1930

And now on this 4 day of February, A. D. 1930, comes Southern Railway Company, defendant in the above entitled cause, by its attorneys, and files and presents its petition for the allowance of an appeal to the United States Circuit Court of Appeals for the 8th Circuit from the judgment heretofore entered herein, on the 10th day of December, A. D. 1929, together with its assignment of errors on such proposed appeal; upon consideration whereof the Court doth order that an appeal be and the same is hereby allowed defendant, as prayed, and that a citation thereon be issued and served, as required by law and returnable within sixty (60) days from the date hereof, and that upon the defendant giving bond in the penal sum of Thirty Thousand Dollars ($30,000.00) within ten (10) days from the date hereof, with surety to be approved by this Court, said judgment be superseded pending the determination of said appeal. Said bond is to be conditioned that the said defendant shall prosecute its appeal to effect and answer all damages and costs if it fail to make it- plea good.

And on the same day comes the defendant, Southern Railway Company, by its attorneys, and presents to the Court its appeal bond, payable to Edward Walters, the plaintiff herein, and conditioned as provided in the previous order of this Court, with the United States Fidelity & Guaranty Company as surety thereon, and the Court having examined said bond and being advised as to the surety thereon, said bond is by the Court approved, and it is hereby ordered that said bond shall operate as a supersedeas in this case.

C. B. Faris, Judge.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT—Filed Feb. 4th, 1930

The Clerk of this court is hereby directed to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals

[fol. 27] for the Eighth Circuit, by including therein the complete record in said cause.

Dated St. Louis, Missouri, this 4 day of Feb., 1930.

Sam'l B. McPheeters, R. E. Costello, Kramer, Kramer & Campbell, Attorneys for Appellant.

Service of the within Præcipe and recipt of a copy acknowledged the 4 day of Feb., 1930.

Louis E. Miller, Attorneys for Appellee.

IN UNITED STATES DISTRICT COURT

No. 8483

EDWARD WALTERS, a Minor, etc., Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, Defendant

Bill of Exceptions—Filed Feb. 4, 1930

CAPTION

Be it remembered that on the 13th, 14th and 15th days of November, 1929, and during the September Term, 1929, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, the following proceedings were had before the Honorable Charles B. Faris, and a jury:

Appearances:

Louis E. Miller, Esq., for Plaintiff.

Kramer, Kramer and Campbell, by Mr. R. E. Costello, and Samuel B. McPheeters, Esq., for Defendant.

Counsel for the respective parties made their opening statements to the jury, and read the pleadings in the case.

And thereupon the plaintiff, to sustain the issues in his behalf, offered the following evidence:

[fol. 28] Mrs. Corda Pettit, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Corda Petfit.

Q. Talk out loud enough so all these gentlemen can hear you. Where do you live, Mrs. Pettit?

A. 727 North Thirteenth Street, East St. Louis.

Q. On March the third, the afternoon of March 3, 1927, were you in the vicinity of Bond Avenue and Eighth Street, in East St. Louis?

A. I was.

Q. Just state to the jury what, if anything, you saw of an unusual nature that occurred there at that time.

A. Well, we were coming up on Tenth Street and there we stopped for the train. The train was going across. I looked under the car and I saw the little boy down at the side of the train, floundering like he was throwing himself away from the train. He had been mangled by the train.

Q. Which way does Bond Avenue run, in East St. Louis?

A. East and west.

Q. East and west?

A. Yes, sir.

Q. Which direction on Bond Avenue had you been proceeding prior to this time?

A. We were going west.

Q. With whom were you?

A. Mrs. Odell.

Q. As you came west on Bond Avenue, at Eighth Street, did you observe a train with a cut of cars, or an engine with a cut of cars attached to it?

A. Yes, sir.

Q. Which direction was it moving in?

A. It was going north.

Q. What, if anything, was done by the driver of the car in which you were a passenger, as you approached these tracks?

A. Well, she stopped the machine there for the train.

Q. Stopped the machine?

A. Yes, sir.

Q. Did you see the engine that was pulling this cut of cars across Bond Avenne?

A. I couldn't see the engine; it has just crossed.

Q. Then what did you observe, if anything, lying in the street?

A. Well, I observed the little boy lying there.

Q. Just what movement did you observe about him, if any?

A. Well, he was throwing his little body like he was trying to throw himself away from the train?

[fol. 29] Q. What did you do?

A. I talked to him and told him to be careful and not get under the train.

Q. Of course, you got out of your car before you talked to him?

A. I got out of the car and talked to him through the cars.

Q. Did you observe that train stop?

A. No, sir.

Q. Had you observed any sound out of it prior to the time it crossed over Bond Avenue?

A. No, sir; I had not.

Q. Are you related to this boy in any way?

A. Not in any way.

Q. Are you a friend of the family?

A. Not in any way.

Q. After the train and this cut of cars had passed by, what, if anything, was done?

A. Well then there was a crowd came there.

Mr. Miller (to the jurors): Can you gentlemen hear?

Jurors: No.

Mr. Miller (to the witness): You will have to speak loud so that these men may hear you.

Q. What was done after the cars had passed?

A. Well, Mrs. Odell ran back and called for an ambulance, but a crowd came then and I didn't go up to the boy.

Q. You didn't go up to the boy?

A. No, sir. I asked a man to pick him up and put him in the car——

Mr. Costello: That is objected to, what she asked the man.

The Court: Oh, yes.

Mr. Miller: Then did you observe him taken up, after this accident?

A. Yes, sir.

Mr. Miller: That is all.

Cross-examination.

By Mr. Costello:

Q. Mrs. Pettit, you were riding in an automobile with Mrs. Odell, as I understand it?

A. Yes, sir.

Q. And you had been traveling in a northerly direction on Tenth Street?

[fol. 30] A. We were going west.

Q. But where did you turn on to Bond Avenue?

A. On Tenth Street, yes.

Q. And when you were on Tenth Street what direction had you been traveling in?

A. I don't know. I know we turned on Tenth.

Q. You will have to keep your voice up.

The Court (to the witness): We can not hear you. I can not hear you, and I imagine the jury can not hear you.

By Mr. Costello:

Q. Which direction had you been traveling on Tenth Street before you turned on Bond Avenue Mrs. Pettit?

A. Well, I don't know. We turned up Tenth—I don't know the direction; I don't remember.

Q. Do you know the direction that you were traveling on Bond Avenue in approaching the railroad tracks?

A. We were going west on Bond.

Q. Now, then, from Tenth Street down to the place where the tracks cross Bond Avenue, how far is it, Mrs. Pettit?

A. I am not sure; I don't know.

Q. Do you know where Eighth Street is, in the City of East St. Louis?

A. I would know where it is, yes.

Q. Do you know whether in coming from Tenth Street, west on Bond Avenue, you cross Eighth Street before you get to the railroad tracks?

A. Yes, you cross them.

Q. Did you cross Eighth Street before you got to the railroad tracks on this day?

A. Yes, sir.

Q. When you turned off of Tenth Street on to Bond Avenue, was the train crossing Bond Avenue at that time?

A. I observed the train when we came up and stopped for it. I don't know just—we were going close to it.

Q. Was the train crossing Bond Avenue when you first saw it?

A. Yes; it was across.

Q. Had the engine crossed over Bond Avenue when you first saw it?

A. Yes, sir.

Q. Do you know how many cars had crossed over Bond Avenue when you first saw the train?

A. Just a few.

Q. Do you know how many?

A. No.

Q. Did you see any part of the engine?

A. I could see the engine across the track.

Q. How far was the engine from Bond Avenue?

A. Just a little way across the track.

[fol. 31] Q. Are you able to tell how many cars had crossed?

A. No, sir; just a few.

Q. But the engine and a few cars had crossed Bond Avenue before you ever saw the boy, is that correct?

A. Well, they were across the track when we stopped there; the engine and a few cars.

Q. You did not see the boy before you stopped?

A. Not until we got out of the car.

Q. Not until what?

A. Until we got out of the car.

Q. What attracted your attention to the boy?

A. The little fellow floundering around.

Q. I will ask you this, Mrs. Pettit: Why did you get out of the car?

A. I must have saw the little fellow.

Q. How is that?

A. I guess we must have saw the little fellow there.

Q. But you said, if I understood you correctly, that you did not see the boy until you got out of the car.

A. We stopped and got out of the car. We did see the little boy over by the train.

Q. Did you see him before you got out of the car?

A. Yes, sir.

Q. And after you saw the boy then you got out of the car, and then you looked underneath, and you could see him plainly?

A. I could see him through those——

Q. Could you see him while you were sitting in the car?

A. Yes, we could see him.

Q. And he was on the opposite side of the train from which you were, is that correct?

A. We could see through the cars, yes.

Q. Did you hear anything from the boy before you saw him?

A. No, sir.

Q. Mrs. Pettit, did I understand you to say that you saw the train before it ever started to cross Bond Avenue?

A. No, you didn't understand that.

Q. Do you know whether it stopped at Bond Avenue, or not?

A. I am sure it did not.

Q. Do you know, Mrs. Pettit, whether it stopped at Bond Avenue?

A. I am sure it didn't.

Q. I am not asking you that. Do you know whether it did or not?

A. I am sure it didn't.

Q. The engine and a few cars were over before you ever saw it?

A. Yes.

Q. And you had not seen it at any time while it was south of Bond Avenue?

A. I didn't notice it.

Q. You are the same Mrs. Pettit who testified before in this case, are you?

A. Yes, sir.

[fol. 32] Mr. Costello: I think that is all.

The Court (to the witness): When you came into Bond Avenue the engine had gotten clear across that Avenue, had it not?

A. When I saw it, yes.

Q. How many cars were behind the engine when you first observed it?

A. Well, just a few; I am not positive.

Q. How many? Do you mean by "a few" three or four?

A. Well, I don't know; it was just a few cars.

Q. Did you know the engine or train was there until you turned into Bond Avenue?

A. No, sir.

Q. Then your statement that it did not stop is not bottomed upon anything you saw or heard, is it?

A. I don't think it stopped.

Q. Well, why do you say that?

A. Well, it seemed like I would have noticed it halting there, if it had.

Q. You said you did not see it until you turned into Bond Avenue, and did not know it was there until you came to Bond Avenue.

A. I didn't, until we came up. I was not driving the car. I would not notice as much as had I been driving.

Q. You are testifying here from what you saw about it, whether you were driving or not driving. I simply want to know whether you saw the engine either stop or not stop.

A. I didn't see it stop.

The Court: Very well.

Redirect examination.

By Mr. Miller:

Q. Did you see any portion of the engine crossing over Bond Avenue?

A. No; I could see the engine after it had crossed.

Mr. Miller: That is all.

Mr. Costello: That is all for the defendant.

ROBERT L. ZALLEE, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. State your name.

A. Robert L. Zallee.

Q. What is your business?

A. Commercial photographer.

[fol. 33] Q. Where is your office or place of business?

A. 720 Washington Avenue.

Q. By whom are you employed, generally, Mr. Zallee, as a photographer?

A. Well, railroad companies and lawyers and everybody else.

Q. Do you do any work for any railroad companies?

A. Yes, sir.

Q. What companies?

A. Wabash and Rock Island.

Q. How long have you been doing work for them?

The Court: It does not make any difference whether he worked for a railroad company or Methuselah. What we want to know is whether he took some pictures, I suppose. Let us get down to it. I am in a hurry.

By Mr. Miller:

Q. I will show you here "Plaintiff's Exhibit A", and ask you if you can tell us what that is.

A. Yes, sir; a photograph made of Bond and the Southern Railroad Company's tracks, looking west.

Q. Did you take that picture?

A. Yes, sir.

Q. I will show you what has been identified as "Plaintiff's Exhibit B", and ask you if you took that.

A. Yes, sir.

Q. I will show you what has been marked as "Plaintiff's Exhibit D", and ask you if you took that picture.

A. Yes, I did.

Q. What is that a picture of, if you know?

A. It is a picture of Bond Avenue, looking west, from the west side of Tenth Street.

Mr. Miller: I now desire to offer in evidence what has been identified as "Plaintiff's Exhibit D".

Q. I show you what has been marked "Plaintiff's Exhibit F"; did you take that picture?

A. Yes, sir.

Q. What is that a picture of?

A. That is a picture of Trendley Avenue, looking west, from the east side of Tenth Street.

Mr. Miller: I desire to offer in evidence "Plaintiff's Exhibit F".

Q. I show you what has been marked "Plaintiff's Exhibit E", and ask you if you took that picture.
[fol. 34] A. Yes, sir.
Q. What is that a picture of?
A. That is a picture of Market Avenue, looking west from the west side of Tenth Street.

Mr. Miller: I now desire to offer in evidence what has been marked "Plaintiff's Exhibit E".

Q. I show you what has been marked as "Plaintiff's Exhibit C", and ask you if you can tell us what that is.
A. Yes, that is a picture taken on Bond Avenue, looking kind of southwest, at a point just east of the Southern Railway tracks.

Mr. Miller: I desire to offer in evidence what has been marked "Plaintiff's Exhibit C".

Q. Now, with reference to these exhibits, which depict Market Street, Trendley Avenue and Bond Avenue, at what position was the camera placed at the time those pictures were taken?
A. Well, it was at Tenth Street, looking west.

Mr. Miller: I also desire to offer in evidence what has been marked as "Plaintiff's Exhibit A"; likewise I desire to offer in evidence what has been marked "Plaintiff's Exhibit B".

Mr. Costello: At this time, your Honor, we desire to object to the exhibits that have been offered, for the reason that there is no showing as to when the pictures were taken, or any showing that the conditions at the time they were taken represent the conditions that existed on March 3, 1927, the day of the accident.

The Court: Have you gentlemen shown when they were taken?

By Mr. Miller:

Q. When were "Plaintiff's Exhibits C, E, D, and F" taken, Mr. Zallee?
A. On November the eleventh, 1929.

Q. Were you familiar with the portion of East St. Louis as represented in those pictures?

A. Well, I have been over there a number of times.

Q. I will show you "Plaintiff's Exhibits A and B", and ask you if you can state when they were taken.

A. They were made some time, I think, in May.

Q. Of what year?

A. Of 1929.

Q. Were you over in East St. Louis, and more particularly, in the vicinity of Eighth and Bond Streets, along about March of 1927?

A. I can't say that I was.

[fol. 35] Mr. Costello (to the witness): Keep your voice up.

The Witness: I can't say that I was. I don't remember. I get over there frequently on cases.

By Mr. Miller:

Q. I will ask you if these pictures, which have been identified here, represent or reproduce the views of the various streets contained in them, as known to you to have existed for the last two or three years?

Mr. Costello: I object to that, your Honor, because the witness has said that he does not remember that he was there in March.

The Court: He does not seem to know what the condition was.

Mr. Miller: By other witnesses I can show this condition.

The Court: You can offer those when you have done that.

Mr. Miller: That is all.

Mr. Costello: That is all, Mr. Zallee.

The Court: For the present I will sustain the objection. You can prove it later.

Mrs. Edith Odell, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Mrs. Edith Odell.

Q. Where do you live, Mrs. Odell?

A. Woodland Hills, St. Clair County.

Q. On March 3rd, 1927, were you in the vicinity of Eighth and Bond Avenue, in East St. Louis?

A. Yes, sir.

Q. I will ask you if you observed anything unusual that occurred at or near that intersection on that afternoon.

A. I observed a child laying in the street, with his limb cut off.

Q. Where were you at the time that you made this observation of the child?

A. At Eighth and Bond.

Q. Where had you been, if you remember?

A. I had been to St. Louis.

Q. Where were you going?

[fol. 36] A. I was going to Main Street, the abstract office on Main Street.

Q. The abstract house——

A. Office, on Main Street.

Q. At the time you made this observation that you have just spoken of, in what direction was your car moving; what direction were you facing?

A. West.

Q. On what street?

A. Bond Avenue.

Q. Do you recall where you entered Bond Avenue?

A. At Tenth Street.

Q. As you approached Bond Avenue, going in a westerly direction, I will ask you if you observed a train and a cut of cars cross Bond Avenue?

A. No, sir.

Q. What, if anything—did you bring your car to a stop at that place?

A. Yes; I saw the train coming.

Q. Where were you when you observed the train coming?

A. I was almost to Eighth Street, on Bond Avenue.

Q. At that time were you able to observe the engine of that train?

A. Yes, sir.

Q. Which direction was it moving in?

A. It was going north.

Q. It was going north?

A. Yes, sir.

Q. And as it crossed Bond Avenue, going north, can you state whether or not there were any cars attached to it?

A. Yes, sir, lots of them.

Q. Now, when you observed this train and this engine with the string of cars attached, going north across Bond Avenue, what did you do then?

A. I stopped.

Q. You brought your car to a stop?

A. Yes, sir.

Q. What was the first thing, if anything, you observed after you brought your car to a stop?

A. I pulled my brake back.

Q. Speak a little louder.

A. After I stopped I leaned over against the lady with me, and I saw a little boy by the track.

Q. When you first observed the boy where was the engine, about?

A. It had crossed over the street, Bond Avenue.

Q. Can you state, if any, or how many, cars had crossed over?

A. Well, I don't know exactly. Not many; two or three, something like that.

Q. When you observed the boy lying there what did you do then?

A. I jumped out and ran to him and saw I couldn't climb over; the train was going too fast, and then I ran and called an ambulance.

[fol. 37] Q. Are you familiar with the neighborhood known as Eighth Street and Bond Avenue in East St. Louis?

A. Yes, sir.

Q. Did you know the condition, or at least the condition as it existed there, with respect to the various streets and how they intersected with one another?

A. Yes, sir.

Q. On March 3rd, 1927?

A. Yes, sir.

Q. I will show you what has been marked as "Plaintiff's Exhibit A", and will ask you if that is a correct reproduction of the scene of the accident.

A. Yes, sir.

Q. I will show you also what has been marked as "Plain-

tiff's Exhibit B", and will ask you if you recognize that picture.

A. That is the next corner, isn't it, from Eighth Street? Ninth Street, I think that would be.

Q. Have you been in the vicinity of Eighth——

The Witness: This filling station, that part would be about next, but this——

Q. I will show you what has been identified as "Plaintiff's Exhibit B", and will ask you if that correctly shows the tracks as they were at the point where they cross Bond Avenue, on March 3rd, 1927.

A. Yes, sir.

Q. I believe you stated that "Plaintiff's Exhibit A" correctly shows the conditions as they existed there on that date?

A. Yes, sir.

Q. I will ask you if you have been in that neighborhood since March 3rd, 1927.

A. Yes, sir.

Q. Have you had occasion to be there frequently?

A. Yes; almost every other day.

Q. I will ask you whether or not you have observed any change in the condition of Bond Avenue, at the point where it is intersected by the Southern Railroad tracks, as compared with the condition on March 3rd, 1927.

A. I don't believe I have.

Q. Do you get the same picture, or same view, there today that you did on March 3rd, 1927?

A. At the school you do.

Mr. Miller: I desire to offer in evidence "Plaintiff's Exhibits A and B".

Mr. Costello: I would like to interrogate the witness with reference to the exhibits first.

The Court: Very well.

[fol. 38] By Mr. Costello:

Q. Mrs. Odell, did you ever live in the vicinity of Eighth Street and Bond Avenue?

A. No, I never did.

Q. Did you ever have occasion to live in what is known, in East St. Louis, as the south end of the town?

A. I never did.

Q. Where is Woodland Hills, St. Clair County?

A. I was not living at Woodland Hills at the time; I was living near Centerville Station, and to come to St. Louis I often came down Bond Avenue.

Q. Now, then, Mrs. Odell, I believe you have stated that in the picture that has been marked as "Plaintiff's Exhibit A", there is represented the conditions as they existed on March 3rd, 1927, and that there have been no changes?

A. I don't say there has not been. I said I had not noticed any.

Q. Then, Mrs. Odell, are you sure now that the picture that has been marked "Plaintiff's Exhibit A", correctly represents the conditions as they existed on March 3rd, 1927?

A. Yes, I know that, because I passed there often.

Q. Calling your particular attention to the fence that is around the school yard there at the school——

A. I don't believe the fence is there now.

Q. I will ask you if the picture marked "Plaintiff's Exhibit A", and the representation shown there of the fence, represents the condition of the fence as it existed on March 3rd, 1927.

A. I never looked at the fence or the school house.

Q. I am not asking you that, Mrs. Odell. Does it represent the condition of the fence as it existed——

A. I don't know about the school house.

Mr. Miller: He is attempting to qualify her on an immaterial matter. There is nothing in the pleadings——

The Court: I recall that the fence was an important matter——

The Witness: It was there at the time.

The Court: I recall that the fence cut quite a figure. Of course, it may be that the street was there and the tracks were there, but the question here is as to the surroundings which make for visibility, or the lack thereof.

Mr. Costello: That is right, your Honor.

The Witness: The fence didn't bother me. I was not near the fence.

[fol. 39] By Mr. Costello:

Q. Did I understand you to say that the picture that has been identified as "Plaintiff's Exhibit A", also "Plain-

tiff's Exhibit B", correctly represent the conditions of the street and the conditions of the track as they existed there on March 3, 1927?

A. Yes, sir.

Q. And there has been no change in the street and the track?

A. I can't say there is. I haven't noticed any, but I do believe the fence is gone.

Q. You do say that they represent the condition of the surroundings there, the fence and other things, as they existed?

A. I don't know exactly; I couldn't say about that. It is not necessary.

Mr. Costello: We object to the offer of "Plaintiff's Exhibits A and B", for the reason that the evidence does not show that they represent the true condition of the surroundings as they existed on March 3, 1927.

The Court: Well, the objection will be sustained for the present.

There are questions, gentlemen, serious questions here, of structures, or the lack thereof, making for visibility, and if you put those pictures in, without those things there, they do not represent the situation that existed then, and they, therefore, mislead the jury.

I call your attention to the case of Riggs versus Metropolitan Street Railway Company, decided by the Supreme Court of Missouri fifteen years ago, in which that precise question was ruled on.

Mr. Miller: Very well; we will renew our offer later on.

The Court: Yes. When you show pictures that depict the situation as it was at that time, then they are admissible, but if there has been any change, which change makes for visibility, or which so changes the situation as to be confusing and misleading, then you are not entitled to offer them. The jury would get them mixed up.

Mr. Costello (to Mr. Miller): Shall I finish cross-examining?

Mr. Miller: No, I have not concluded my direct examination.

[fol. 40] Direct examination.

Resumed by Mr. Miller:

Q. As you approached this railroad crossing, I will ask you if you heard any whistle blown, or any bell rung.

A. No, sir.

Q. Now, when you observed this engine, that you speak of, cross over Bond Avenue, I will ask you whether or not you say any men on any part of the engine or tender.

A. I never.

Q. Did you see any men on any portion of the engine?

A. No, sir.

Q. After the cars had passed over, what did you do?

A. As soon as I—almost as soon as I stopped, possibly a second or two afterwards, I noticed a child, and I jumped out and ran to him, and then I ran back and called an ambulance.

Q. Are you any relation to Mr. or Mrs. Walters?

A. No, sir; I never met her before.

Q. Did you know them before this occurrence?

A. Never.

Mr. Miller: That is all.

Cross-examination.

By Mr. Costello:

Q. Mrs. Odell, just a few questions, please. You had been on Tenth Street?

A. Yes, sir.

Q. Before you turned on to Bond Avenue?

A. Yes, sir.

Q. Mrs. Pettit was riding in the car with you?

A. Yes, sir.

Q. And, of course, in going from Tenth Street up to the tracks she went along, the same time that you did?

A. Yes, sir.

Q. Now, then, as I understand it, when you got up to the tracks, or near the tracks, you stopped your car?

A. Yes, sir.

Q. At that time, when you stopped, you had not seen the boy, had you?

A. No, sir.

Q. And at the time that you stopped there, and while you were waiting there, and before you saw the boy at all, the engine and a few of the cars had crossed over Bond Avenue?

A. When I noticed the child?

Q. Yes, before you ever saw the boy.

A. Before I saw the child the engine and possibly two or three cars had passed over. When I first saw the train it was about seventy-five or a hundred feet from the crossing.

[fol. 41] Q. In which direction?

A. It was going north, it was coming.

Q. When you say "from the crossing", which direction was it from the crossing?

A. It was south of the crossing, going north.

Q. It had not reached Bond Avenue?

A. No, it had not. It was about seventy-five or a hundred feet.

Q. About a hundred and seventy-five feet?

A. No, I said seventy-five or a hundred.

Q. Pardon me.

A. About seventy-five or a hundred feet.

Q. South of Bond Avenue, when you first saw it?

A. Yes, sir.

Q. Did you see the boy at that time?

A. No, sir; I never. I was not looking in that direction, I was looking toward the train.

Q. You were looking toward the train, but the train was in what direction?

A. The train was to my left; it was south of me.

Q. When you did see the boy what direction was he from you?

A. He was just exactly the direction he is now. He was southwest. I was right here, almost in the middle of the street—not quite—and he was just where he is now.

Q. He was southwest of you?

A. Yes, sir.

Q. Now, then, what first attracted your attention to the boy?

A. Playing in the street, I thought he was playing in the street, and I said to the lady "A baby playing in the street."

Q. You can not tell what you said to somebody else, Mrs.

Odell. Had the train or the engine passed over Bond Avenue at that time?

A. Yes, sir.

Q. And you could see the boy there playing in the street, could you?

A. I saw him; as soon as I saw him the train and engine passed over. I saw him between the cars; I was near the track.

Q. And you thought at that time he was playing in the street?

Mr. Miller: I object to what she thought.

The Court: Oh, yes.

The Witness: I did, sure.

The Court: Let us have the facts.

[fol. 42] Mr. Costello: The question is withdrawn.

The Witness: I thought he was playing in the street.

By Mr. Costello:

Q. Then the next thing you saw was the boy down underneath the train?

A. No, sir; I never saw him under the train. He was three or four feet, three feet, at least, from the track when I got to him. He was about that far when I first saw him. He was wiggling——

Q. Will you kindly explain to the jury what you mean by when you got to him?

A. As soon as I saw him I thought he was playing. She said "The little boy wiggled——

Q. Don't tell what she said.

The Court (to the witness): Just answer the question that you are asked, and stop, and we will get along very nicely.

By Mr. Costello:

Q. Just state what you mean when you say you got to the boy. That is what I want to know.

A. I have told you two or three times that——

Q. Did you get to the boy before the entire train had crossed over Bond?

A. Oh, I got an ambulance called and clear back out of there, and then stood for ten minutes, fifteen or twenty minutes, before the cars crossed.

Q. Was not the boy on the opposite side of the train from you?

A. Yes, but I ran to the train. I was as close to the train as I could get, and he was as close, almost, as he could get.

The Court (to the witness): But the train was between you and him?

The Witness: Yes, sir.

Mr. Costello: That is what I want to know.

The Witness: That is what I told you.

Mr. Costello: That is all.

Redirect examination.

By Mr. Miller:

Q. Do you know about how many cars there were in this train?

A. I couldn't say; it seemed to me like a hundred.

[fol. 43] Q. Did I understand you to say that you got out of your car, saw the boy there, went and called an ambulance, and got back from your call before the last car had——

A. Oh, fifteen or twenty minutes; fifteen minutes, anyway. As the train got on its way further it went slower and slower, until I thought it would never pass.

Q. When you stated that you saw the boy sort of wriggling in the street—did I understand you to say that?

A. Yes, sir.

Q. Was that the only movement that you saw out of him?

A. That is all.

Q. And when you made some reference to playing, that is not what you observed, or just what you said to the other lady?

A. That is what I said. She said he was wriggling——

Q. Do not tell that. That is all.

The Court (to the witness): What street, Madam, does the track run on?

A. Eighth Street.

Q. Eighth Street?

A. Yes, sir.
Q. And the street next east that is Ninth Street?
A. No. It is a double track—you mean the double track?
Q. No, I mean the street next east of the track.
A. Next west is Ninth Street.
Q. Whereabouts is Tenth Street?
A. It is east.
Q. Then it is Tenth Street, Eighth and Ninth?
A. No; Tenth, Ninth and Eighth. Ninth Street is east and Tenth Street is east; Eighth Street and then Seventh.
Q. Then the railroad is on Eighth?
A. Yes, sir.
Q. The next one east is Ninth?
A. Yes, sir.
Q. And the next one east is Tenth?
A. Yes, Tenth.
Q. Where did you turn it at?
A. Tenth Street.
Q. You were, then, two blocks away?
A. Yes, sir.
Q. And you saw the train?
A. No, sir.
Q. You did not see the train then?
A. No, sir.
Q. Where were you when you first saw the train?
A. I was about seventy-five—oh, I was about, I guess, seventy-five or a hundred feet from the crossing. Seventy-five feet, not more than that.
Q. What is there to your left, just before you reach Eighth Street?
A. There is a store; that is where I went to call up an ambulance.

The Court: Very well.

[fol. 44] Recross-examination.

By Mr. Costello:

Q. Just a question, Mr. Odell. As a matter of fact, the railroad tracks are not in Eighth Street, are they?
A. Well, I have heard it ever since I have been in East St. Louis. I don't know.

Q. I will ask you if it is not a fact that the railroad tracks themselves are some one hundred and fifty or one hundred and seventy-five feet west of Eighth Street, in the City of East St. Louis?

A. Well, I have always thought that Eighth and Bond—that the Southern tracks are on Eighth Street. I have always been told that.

Q. Is there a Ninth Street in East St. Louis, that intersects Bond Avenue?

A. Well, I couldn't say for sure. There would be—I mean, there is two blocks.

Q. I just asked you if you knew that there was.

A. Well, there is two blocks.

Q. In which direction was the engine headed?

A. I do not know if it was going forward or pushing.

Q. Was the engine in front of the train?

A. Certainly.

Q. You don't know whether the——

A. Whether it was pushing or pulling, I couldn't say.

Q. Did you see the engine hit anything?

A. No, sir; I did not.

Mr. Costello: That is all.

THOMAS HEHER, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Thomas Heher.

Q. Where do you live?

A. 4021 North Florissant Avenue, St. Louis, Missouri.

Q. What is your business, your occupation?

A. Chauffeur.

Q. For whom?

A. Elliott Frog & Switch Company.

Q. On the third day of March, 1927, were you in the vicinity of Eighth and Bond Avenue?

A. A half block away.

[fol. 45] Q. Did you observe any unusual occurrence taking place near the point where the Southern Railway tracks intersect with Bond Avenue?

A. Well, I came down to get gasoline, and I passed there five minutes before the train got there.

Q. What, if anything, did you see in reference to an unusual occurrence there? Tell the jury what you saw and observed.

A. Well, the children were coming out of school, and I knew——

Mr. Costello: That is objected to——

The Court: Yes, just leave out what you knew and state the facts, what you saw or heard.

The Witness: Well, I was there in the filling station getting gasoline, and I heard some woman start screaming——

Mr. Costello: We object to what some woman was going to say.

The Court: Objection overruled. That is admissible.

The Witness: And I heard some woman holler, "Get an ambulance, get an ambulance." I thought they was having some trouble in the street and I ran out in the street, and see six cars of the train go by, and I seen some little boy laying in between the cars. When I got there somebody pulled him away from the cars and up on the sidewalk. I waited until the cars got by and then went over, and there was a fellow in his machine, and we picked the little boy up and put him in the machine.

By Mr. Miller:

Q. Did you see the engine as it crossed Bond Avenue?

A. I just got by when the train went by.

Q. Where were you just before this occurrence took place?

A. Well, I was coming down to get gasoline.

Q. I will show you a picture here which has been marked as "Plaintiff's Exhibit B", and I will ask you if you can tell us what that is.

A. This is Bond Avenue, facing east; taken from the right, and a corner——

Q. I will ask you if the condition, shown in that picture, is the same as you observed it on March 3, 1927?

A. Yes, sir. it is just the same, looking east.

Q. Have you been at that intersection quite frequently?

A. For eight years.

[fol. 46] Q. Now, I will show you what has been marked as "Plaintiff's Exhibit A", and will ask you if you can tell us what that is a picture of.

A. That is the school, looking west.

Q. When you referred to some children coming from the school, a moment ago, is that the school you had reference to?

A. It is the school, yes.

Q. I will ask you if what is shown in that picture depicts, or shows, the condition as you observed it on March 3rd, 1927.

A. No. I am pretty sure they have a new fence up there.

Q. You are pretty sure they have a new fence?

A. Yes, sir.

Q. Aside from the fence feature of the picture, I will ask you if the other physical facts and surroundings are the same as you observed them on March 3rd, 1927.

A. The way I can see it from here.

Mr. Miller: I renew my offer of "Plaintiff's Exhibits A and B".

Mr. Costello: May I ask the witness a few questions, your Honor?

The Court: Very well.

By Mr. Costello:

Q. Did you ever live in East St. Louis?

A. No, sir.

Q. How long have you worked in East St. Louis, or how long had you worked in East St. Louis on March 3rd, 1927?

A. Well, I have been over there eight years, in October.

Q. How long had you worked there on March 3rd, 1927?

A. Six years.

Q. For whom?

A. Elliott Frog & Switch.

Q. As I understood you, the picture marked "Plaintiff's Exhibit A", as you understand it, represents the condition of the school——

A. Now.

Q. The condition of the school and the condition of the street and the condition of the tracks as they existed?

A. Yes, sir. Well, the school had a new fence.

Q. I am getting to that. It does not represent the condition of the fence that was around the school yard there on March 3rd, 1927, does it?

A. No.

[fol. 47] Q. No. Of course, the picture marked "Plaintiff's Exhibit B", when you say that that represents the conditions, as they exist there now, and then, what do you mean by that?

A. Well, there has been no changes since that time.

Q. In what?

A. Well, in the building, or in anything.

Q. Have there been any changes in the street?

A. Yes, sir; the street, they might have fixed the track up a little bit, but that is all.

Q. Do you know whether they did or not?

A. I have seen them, off and on, putting a little tar and gravel in between the rails.

Q. Do you know whether there has been any change in the sidewalk there?

A. No.

Q. Do you know?

A. Yes, sir.

Q. Has there been any change?

A. Not that I know of.

Q. Then I will ask you this question: Do you know if there has been any change in the sidewalk as it existed there on March 3rd, 1927?

A. No.

Q. You don't know, is that what you mean?

A. No; I said no.

Q. There has been no change?

A. No changes; no new sidewalks or anything put down.

Q. Of course, you do not mean to say that the machines that appear in the picture marked "Plaintiff's Exhibit B", were there at the time, on March 3rd, 1927?

A. Well, I never paid no attention to the machines that was parked there.

Q. I will ask you whether or not the picture known as "Plaintiff's Exhibit A", shows a watchman's shanty.

A. No.

Q. Was there a watchman's shanty on the intersection of the railroad track and Bond Avenue, on March 3rd, 1927?

A. No, sir.

Q. Was there any tower of any kind, on any of the corners of the intersection formed by the railroad track and Bond Avenue, on March 3rd, 1927?

A. No, sir.

Mr. Costello: We have no objection to "Plaintiff's Exhibit B", but we object to "Plaintiff's Exhibit A", because it does not correctly represent the conditions as they existed on March 3rd, 1927. That is the one, your Honor, where we called particular attention to the fence.

[fol. 48] The Court: Yes, I shall exclude the one which does not show the fence. I recall the figure the fence cut in the case, and it is very important. It is confusing, therefore, to the jury.

Mr. Miller: I withdraw the presentation of the offer of that at this time.

The Court: Very well.

Direct examination.

By Mr. Miller:

Q. I show you what has been marked "Plaintiff's Exhibit E", and which has been identified as Market Street, looking west, and ask you if you are familiar with that scene in East St. Louis.

A. Yes, sir.

Q. Along about the third of March—not necessarily on that date, but about that time, I will ask you if you ever had occasion to be in the vicinity of Tenth and Market Street there?

A. No, sir.

Q. I will ask you if that picture is a correct representation of a view loking west on Market Street, from Tenth Street, in East St. Louis.

A. Yes, sir.

Q. I show you what has been marked "Plaintiff's Exhibit F", and I will ask you if this picture is a correct reproduction of the view that you get by looking west on Trendley Avenue, from Tenth Street, in East St. Louis.

A. Yes, sir.

Q. I show you what has been marked as "Plaintiff's Exhibit D", and will ask you if this picture is a correct reproduction of the scene looking west on Bond Avenue, from Tenth Street.

A. Yes, sir.

Q. I will ask you, in so far as you can observe from that picture, if that is a correct reproduction of the physical layout of the buildings and streets as they were on March 3rd, 1927?

A. A. Yes sir.

A. Have you ever driven north on Tenth Street, and looked west, either on Market Street, or on Trendley Avenue?

A. Yes, sir.

Mr. Miller: Your Honor, I will show the materiality of this later on.

Q. I will ask you if, in driving north on Tenth Street, you can look west and observe a train of box cars, if there are any, on the tracks of the Southern Railroad.

A. Yes, sir.

Mr. Miller: I will renew the offer of "Plaintiff's Exhibits E, F, and D".

[fol. 49] The Court: Is there any objection to them?

Mr. Costello: May I ask a few questions, your Honor?

The Court: Very well.

By Mr. Costello:

Q. When is the first time you ever saw these pictures?

A. Just now.

Q. Did you talk to anybody about the pictures?

A. No, sir.

Q. I will hand you a picture marked "Plaintiff's Exhibit D": What did you say that represents?

A. Looking west from Tenth Street.

Q. On what?

A. On Bond Avenue.

Q. Do you know where the camera was located when that picture was taken?

A. I think it is in the middle of the street.

Q. Do you know where it was with reference to Tenth Street?

A. Well, I would say right on the sidewalk, on the west side of Tenth Street.

Q. Are you a photographer, Mr. Heher?

A. No, sir.

Q. Have you had any experience as a photographer?

A. No, sir.

Q. Now, then, the picture marked "Plaintiff's Exhibit E": What does that represent?

A. That is looking west on Market Street, from Tenth.

Q. Market or Piggott?

A. Market.

Q. Where was the camera when that was taken?

A. That was in the middle of the street, on the west side of Tenth.

Q. The middle of what street?

A. Market Avenue.

Q. On the west side of what street?

A. Tenth Street.

Q. You were not present when the picture was taken?

A. No, sir.

Q. I hand you a picture that has been marked——

Mr. Miller: I submit, the inquiry about the relative positions of the camera is wholly immaterial and an improper method of qualifying and examining this witness. I submit, that is a matter for an expert. We have not produced him [fol. 50] for the purpose of testifying as an expert on matters of photography, but simply to identify the physical lay-out of certain streets, as reproduced in these pictures.

The Court: Well, I question whether, with or without an objection, I ought to permit this record to be confused by offering views of Market Street, and the Street just south of it. It is confusing, in the extreme.

I do not know whether there will be any contention that these two streets, Market and Trendley, are open, so one can see down them, or not. Is there any contention about that?

Mr. Costello: No contention about it at all.

The Court: Then why go to the trouble of offering a picture that you can see down the street in, when there is no

contention that you cannot see down the street, providing you look?

Mr. Miller: I will show the materiality of the picture from a witness that I hope to produce a little later. It will give the jury a better picture, I think, of what he is testifying to.

The Court: I do not see the materiality of it at all.

By Mr. Costello:

Q. Calling your particular attention to the picture of Bond Avenue, looking west from Tenth, "Plaintiff's Exhibit D", marked as such: I will ask you if that picture correctly represents the conditions as they existed at the crossing of the Southern Railway Company's tracks with Bond Avenue, on the third day of March, 1927.

A. Yes, sir.

Q. Does it show any towers at that intersection, or any watchman's shanty?

A. No, sir.

Q. And I believe you said there were none at that time?

A. Yes, sir.

Mr. Costello: If the Court please, we have no objection to "Plaintiff's Exhibit D", which is the picture of Bond Avenue, but we object to "Plaintiff's Exhibits E and F", which are Market and Trendely Avenue, for the reason that they are incompetent, irrelevant and immaterial.

Mr. Miller: Very well; I will withdraw the others.

The Court: I think so. I think they are confusing, gentlemen.

[fol. 51] Direct examination.

Resumed by Mr. Miller:

Q. Now, Mr. Heher, where were you at the time that you heard this scream that you have referred to?

A. I was a half block away, at the filling station——

Q. I will ask you if that filling station is shown in "Plaintiff's Exhibit B".

A. Yes, sir.

Q. In which direction would you be looking if you were looking at the filling station?

A. When I was there? This would be right where this watchman's tower is, on the southwest corner (indicating on Exhibit B).

Q. Which direction would you be facing in, as indicated on that picture, if you were looking directly at the filling station; what direction would you be facing, south?

A. East.

Q. Whose filling station is that?

A. Ward's.

The Court (to the witness): On what corner?

A. It is on Eighth and Bond.

Q. What corner of Eighth and Bond?

A. The east, northeast corner.

By Mr. Miller:

Q. Now, from your position on the northeast corner of Eighth and Bond, did you have a clear view of that portion of Bond Avenue that is crossed, or intersected by the tracks of the Southern Railroad Company?

A. Yes, sir.

Q. When you heard this scream, are you able to state where the engine was that was hauling or pulling this cut of cars?

A. Yes, sir.

Q. Approximately where was it, with reference to Bond Avenue?

A. Six car lengths from Bond Avenue.

Q. North or south?

A. North.

Q. What did you then do?

A. Well, I—Mr. Ward and myself ran out in the street to see what the trouble was, and I seen some little boy laying under the cars, and some man reached down and picked him up and pulled him over to the sidewalk. By the time the cars got by I ran over and helped pick the little boy up and put him in the automobile.

Q. How long have you driven an automobile?

A. About fourteen years.

[fol. 52] Q. During the time that you have driven one, have you observed the speedometers as they registered various speeds, when you passed from point to point?

A. Yes, sir.

Q. Are you able, from that experience, watching your speedometer, and watching cars move from one point to another, to form a fair and reasonable approximation of the probable, or approximate speed of the cars in this train?

A. About ten miles an hour.

Q. Did you, at any time prior to the time that you heard that scream, hear any whistle or bell sounded?

A. No, sir.

Mr. Miller: That is all.

Cross-examination.

By Mr. Costello:

Q. Where do you live? I did not get your address.

A. 4021 North Florissant, in St. Louis.

Q. And how long have you lived there?

A. Going on two years.

Q. How long did you say you had been in the employ of the Elliott Frog & Switch Company?

A. About eight years.

Q. Where is that Company located?

A. 301 South Main, East St. Louis.

Q. Is the Elliott Frog & Switch Company now in operation?

A. Yes, sir.

Q. Was it in operation on March 3, 1927?

A. Yes, sir.

Q. What is the name of the plant that is operating the Elliott Frog & Switch Works in East St. Louis?

A. Ramapo Ajax.

Q. Ramapo Ajax?

A. Yes, sir.

Q. How long has the Ramapo Ajax Corporation been operating that plant?

A. About four years.

Q. Now, then, Mr. Heher, as I understand you, you were on your way to the filling station?

A. Yes, sir.

Q. To get some gasoline. Going in which direction, and on what street?

A. East on Bond.

Q. You had come from where?
A. West.
Q. I know west, but where west?
A. The shop, Elliott Frog & Switch shop.
Q. And what filling station were you going to?
A. Ward's Service Station, Eighth and Bond.
Q. Did I understand you to say that when you were going east on Bond Avenue you saw the train there?
A. Yes, sir.
[fol. 53] Q. Had it crossed Bond Avenue at that time?
A. No, sir.
Q. Did you cross ahead of the train?
A. Yes, sir.
Q. How far was the train from Bond Avenue when you crossed?
A. I would say a half block.
Q. Was there anything that attracted your attention to the train when you crossed?
A. Well, I generally always look when I cross.
Q. No, was there anything out of the ordinary to attract your attention to this train, when you crossed on this particular day?
A. No, sir.
Q. Now, then, as I understand it, you went east on Bond Avenue to Eighth Street?
A. Yes, sir.
Q. How far is Eighth Street from the railroad tracks?
A. Half a block.
Q. Half a block east of the railroad track is Eighth Street?
A. Yes, sir.
Q. And you drove into the filling station, did you?
A. Yes, sir.
Q. When you drove into the filling station, did you drive up to the pumps?
A. Yes, sir.
Q. And how long did you say you were at the pump until you heard this scream?
A. Ten minutes.
Q. Ten minutes?
A. Yes, sir.

Q. In the meantime, did you observe the train keep on moving?

A. Yes, sir.

Q. At the time you heard the scream what part of the train had crossed Bond Avenue?

A. The engine and five cars.

Q. Five cars, or six?

A. Six cars.

Q. Now, then, as I understand you, when you first saw the engine—if I am right—it was down, how far south of Bond Avenue?

A. Between Market Avenue and Bond.

Q. That is a half block?

A. That is a half block.

Q. Then from the time that you ran from the railroad track, a half block over to the filling station, and waited in the filling station for ten minutes, the engine had come from a half block south of Bond Avenue, up and over Bond Avenue, so that it was six car lengths north of Bond Avenue; is that correct?

A. Yes, sir.

Q. And you say that during the time it was traveling that distance it was traveling ten miles per hour?

A. Yes, sir.

Q. Was there anybody else in the filling station while you were there?

[fol. 54] A. Well, the man that owns the place.

Q. What is his name?

A. Ward.

Q. What is his first name?

A. Ben Ward.

Q. How long had you known Mr. Ward?

A. Well, I have known him about six years.

Q. Was anybody else there?

A. No, sir.

Q. Nobody there in the filling station except you?

A. Well, the man that owns it.

Q. I mean, you and Mr. Ward, of course.

A. No, sir; not that I know of.

Q. Were there any other cars in there?

A. No, sir.

Q. No trucks parked in there?

A. Well, I didn't pay any attention to whether trucks were parked in there or not.

Q. I will ask you this: How far are the pumps, where you were standing when you heard the scream, from Bond Avenue?

A. Well, they are situated about seventy-five feet from Bond Avenue.

Q. Seventy-five feet in which direction?

A. North; kind of cater-corner north.

Q. And how far are they from Eighth Street, to the east?

A. Bond Avenue.

Q. No; how far are the pumps east from Eighth Street, that are in the filling station?

A. Well, I would say about fifty-five feet.

Q. Are there any buildings on the west side of Eighth Street, and north of Bond Avenue?

A. Yes; there is a store on the west side.

Q. Are there any buildings north of the store, and on the west side of Eighth Street?

A. On the north side? West of Eighth? There is the railroad tracks and then there is the Refining Company.

Q. You did not understand me, Mr. Heher. Are there any buildings north of this store building?

A. Yes, sir.

Q. And North of Bond Avenue?

A. Yes, sir.

Q. Is it closely built up in there?

A. Yes, pretty well close together.

Q. Can you see a train on the railroad tracks when you are in a position east of these buildings that are on the west side of Eighth Street?

A. Yes, sir.

[fol. 55] Q. Can you see all of the train?

A. Yes, sir.

Q. The buildings do not obstruct your view any?

A. Well, they set kind of low, and the track is rather high.

Q. How much higher is the track then the buildings?

A. I would say when there is a car on it, it would set about a foot higher.

Q. What would set a foot higher?

A. Not the whole car, but part of the car.

Q. You say a foot higher: You mean the car would be a foot higher than the building?

A. No, not the whole car; I would mean the truck loads and stuff.

Q. What I am getting at, Mr. Heher, is when you said the engine and six cars had passed, how did you know there were six cars when the view was obstructed by these buildings?

A. When I run up the track I could see how far the engine was ahead of me.

Q. When you ran up the track you could see?

A. Yes, sir.

Q. Then, you did not see from where you were, over there at the filling station?

A. No, sir.

Q. You say, Mr. Heher, that you had an unobstructed view when you were back there at these pumps, of the crossing of Bond Avenue and Eighth Street?

A. Yes, sir.

Q. I will show you a picture, which I will have marked "Defendant's Exhibit 1", and ask you to state if you know what that is.

A. That is looking east on Bond Avenue.

Q. Does that show the railroad tracks there as they existed on March 3rd, 1927?

A. Yes, sir.

Q. Does it show Bond Avenue as it existed there on March 3rd, 1927?

A. Yes, sir.

Q. Does it show the store building that is located on the northwest corner of Eighth Street and Bond Avenue?

A. Yes, sir.

Q. Does it show the entrance to the filling station, concerning which you have testified?

A. Yes, sir.

Q. Does it show the pumps in the filling station, concerning which you have testified?

A. No, sir.

Q. Does it show the other houses that are located north of the store building, and on the west side of Eighth Street, concerning which you have testified?

A. Some.

[fol. 56] Q. Does that picture, in so far as the radius takes in, correctly represent the conditions as they existed there on March 3rd, 1927?

A. Well, all but the watchman's house and the gates?

Q. What do you mean by "all but the watchman's house and the gate"?

A. That is the same as it was March 3rd, all but the gates was not there; the gate and the watchman's tower was not there then.

Q. It represents the true conditions, except that this watchman's tower which you identify on the southwest corner of the intersection, was not there and the four gateposts, which are on each corner of the intersection, were not there?

A. Yes, sir.

Q. Do you say that those posts were not there on March 3rd, 1927?

A. I am pretty sure.

The Court (to the witness): The answer is that you are not sure?

Mr. Costello: He said he is pretty sure of it. That is all, Mr. Heher.

Redirect examination.

By Mr. Miller:

Q. Did I understand you to say that after you had left the filling station and gotten over the tracks there, you looked up the track and then you were able to tell how many cars had passed over?

A. Yes, sir.

Q. And you say some five or six had passed then?

A. Six cars.

Q. Your statement with reference to the five or six cars passing, was how many had passed after you had gotten over there, is that correct?

A. Yes, sir.

Q. And not when you first heard the scream?

Mr. Costello: That is objected to. He has gone over this once.

The Court: Yes, and you are leading him right along; every question is leading. Do not lead him.

Mr. Miller: Very well. That is all, si

Recross-examination.

By Mr. Costello:

Q. Mr. Heher, at the time you heard the scream, when you were in the filling station, had the engine crossed over Bond Avenue?

A. Yes, sir.

[fol. 57] Q. How many cars had crossed over Bond Avenue?

A. Six cars and the engine.

Mr. Costello: That is all.

Redirect examination.

By Mr. Miller:

Q. Let me straighten this up, Mr. Heher: Do you know how many cars had passed over, or did pass over the Bond Avenue crossing, from the time that you heard this scream until you got down to the crossing and counted some five or six?

A. Yes, sir.

Mr. Costello: That is objected to. The witness has stated——

The Court: I do not know whether he has or not. I will let him answer again.

The Witness: I didn't hear that.

By Mr. Miller:

Q. How many cars passed over the Bond Avenue crossing from the time that you first heard the scream until the time that you got down there and you said you observed some five or six cars?

A. There was six cars passed when I got there.

Q. When you got there?

A. When I got there.

Q. Do you mean to say there were also five or six cars——

Mr. Costello: That is objected to as leading.

The Court (to Mr. Miller): You are leading the witness.

Mr. Miller: How many cars had passed when you first heard the scream, and before you went down; do you know?

A. No, sir.

The Court (to the witness): Do you mean to state you stopped, under those circumstances to count those cars?

A. Well, I could about tell, your Honor.

The Court: Very well.

Mr. Miller: That is all.

Recross-examination.

By Mr. Costello:

Q. At the time——

[fol. 58] (To the Court:) We have gone over this so often, your Honor, that I do not want to delay matters, but I would like to ask this question:

Q. At the time you heard the scream, when you were in the filling station, had the engine crossed over Bond Avenue?

A. Yes, sir.

Q. How many cars had crossed over Bond Avenue?

A. I don't know how many had passed then, but I know how many passed about, when I got there.

Q. Then, your statement a while ago, that when you heard the scream five or six cars had passed over the crossing, is not correct, is it?

A. No, sir.

Q. Had the engine actually crossed over when you heard the scream?

A. Yes, sir.

Q. Do you know that?

A. Yes, sir.

Q. Do you know how long it took you, from the time you heard the scream until the time that you got up there?

A. No, sir.

Q. Did you go right away?

A. No, I kind of walked slow out in the street, and I could about see, where I was at, the bunch on the other side of the car.

Q. Where were you when you counted the cars that had crossed over?

A. Like here was the track, and I was right there (illustrating).

Q. Where were you standing when you counted the cars?

A. I never counted them.
Q. Did you ever count them at any time?
A. No, sir; I have counted cars some, though.
Q. I mean on this particular day did you—
A. Oh, no.

Mr. Costello: That is all.
Mr. Miller: That is all.

JOHN MCKENZIE, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?
A. John McKenzie.
Q. What is your business, Mr. McKenzie?
A. Oil salesman.
[fol. 59] Q. For whom?
A. Liberty Bell Oil Company.
Q. On or about the third day of March, 1927, were you in the vicinity of Eighth Street and Bond Avenue, in East St. Louis?
A. Where the accident was, whatever street it was. I don't know one street from the other.
Q. What was your answer to that?
A. I say, I don't know one street from the other. I am not familiar with the streets.
Q. Did you observe that accident take place, that I have referred to?
A. Did I what?
Q. Did you see an accident take place?
Q. Did I see it take place?
Q. Yes.
A. No, sir.
Q. Now, what, if anything, did you observe at the scene of the accident, that has been referred to, on March 3rd, 1927?
A. The boy laying under the train, under the car.
Q. Speak a little louder, please.
A. A boy laying under the cars.

Q. Where was he lying with reference to the south sidewalk?

A. He was north of the south sidewalk.

Q. About how far out from the south sidewalk; about how far was he from the south sidewalk?

A. Oh farther than from here to you, north of the sidewalk.

Q. On what street was that sidewalk, do you know?

A. It was on the south side of the street, running——

Q. Do you know the name of the street?

A. No, I don't know one from the other.

Q. Do you know where you turned into that particular street, or how you got on to it?

A. I think there is a fire department at Tenth Street.

Q. Where had you come from prior to the time that you got in the vicinity of this accident?

A. Off the Free Bridge.

Q. Had you come from St. Louis?

A. Yes, sir.

Q. As you came over the Free Bridge, do you know on what street you drove, the first one that you drove on?

A. I tried to go up several streets, and this train was moving, and I tried to get around it.

Q. Do you know where Tenth Street is in East St. Louis, with reference to the Free Bridge?

A. It is right off the Free Bridge.

Q. As you left the Free Bridge, did you drive on Tenth Street?

A. North.

[fol. 60] Q. North on Tenth Street?

A. Yes, sir.

Q. Are there any streets that intersect, that is, run east and west, from Tenth Street at that place?

A. From the Bridge to the street I turned into?

Q. Yes.

A. It seemed like three or four.

Q. Where were you intending to go after you got off the Free Bridge and started north on Tenth Street?

A. To the Mississippi Warrior Service, under the Free Bridge.

Q. Under the Free Bridge?

A. Yes, sir.

Q. What, if anything, did you do when you passed that

first street? I will ask you if you intended to turn down the first street?

A. Yes, sir.

Q. What, if anything, did you observe?

A. The train moving north.

Q. The train moving north?

A. That is, the cars.

Q. With reference to the next street north, I will ask you if you intended, or attempted, to turn down that street and go west on it?

A. Yes, sir.

Q. What did you observe there?

A. The same thing.

Q. With reference to the next street, I will ask you if you looked west?

A. The same thing, if that was not Bond Avenue, or the street that you are talking about.

Q. Now, when you got up to the street on which that accident happened, what did you then do?

A. I turned to my left, to go towards the river.

Q. Would that be towards the west?

A. Yes, sir.

Q. I will show you a picture which has been identified as "Plaintiff's Exhibit D", and will ask you if that correctly shows the view of Bo[illegible] Avenue, as you observed it going west on that street, on [illegible]arch 3rd, 1927?

A. That is the school.

Q. Is that the same street?

A. Yes, sir.

Q. Does all the physical lay-out there seem to be the same as it wa[illegible] on that date, in so far as you observed it?

A. I don't remember. It just looks like the street to me, and the school is there. That is all I know.

Q. Do you recall at this time any change in what is shown in this picture, from what you observed as you went west on that street on March [illegible]d, 1927?

A. No, sir.

Mr. Miller: Now, I desire to offer in evidence what has been marked as "Plaintiff's Exhibit D".

[fol. 61] Mr. Costello: It was offered a while ago, and we have no objection.

Mr. Miller: I understood.

Q. What you have just testified to is shown in "Plaintiff's Exhibit D", that is the view you got when you turned off Tenth Street and went west on to Bond Avenue?

A. Yes, sir.

Q. And was that crossing blocked?

A. The engine was just crossing.

Q. The engine was just crossing?

A. The hind end of the engine.

Q. Did you observe any men on that engine anywhere?

A. I couldn't see the other end of the engine. I don't know whether there was any.

Q. I will ask you if you could observe the movement of the train, or anything that indicated its presence there, before you crossed over Bond Avenue.

A. I didn't see it cross there. I say, I saw the hind end of the engine.

Q. You saw just a part of it?

A. The last part of the engine; yes, sir.

Q. Did you finally get up to the railroad tracks?

A. Yes, sir.

Q. And then is when, as I understand you, you saw the little boy lying there?

A. Well, yes; after I got all the way up there I saw him.

Q. Was there a crowd of people there at that time, was anybody gathered around?

A. They were running from all directions.

Q. As I understand, on each of those intersecting streets you observed a moving train of cars?

A. At all times.

Q. Such as is indicated in "Plaintiff's Exhibit D", that you have just identified?

A. I don't know what you mean by that. I saw the train moving.

Q. Such as is shown in the last photograph that was shown to you?

A. The train was moving at all times.

Q. At any time during the time that you first observed it, when you looked west at that first street, after leaving the Free Bridge, did you observe it stop?

A. No, sir.

[fol. 62] Q. Can you say positively that it did not stop at any time, between the time when you first observed it, as

— left the Free Bridge, until after it passed Eighth and Bond?

A. Yes, sir.

Q. Are you positive of that fact?

A. Positive.

Q. You are not related to any of the parties here?

A. No, sir; none whatever. I don't know them at all.

Q. You have no interest in this case?

A. I don't know them at all.

Mr. Miller: That is all.

Cross-examination.

By Mr. Costello:

Q. You came over the Free Bridge on to Tenth Street?

A. Yes, sir.

Q. You don't know the names of the streets there, or how many you passed, do you?

A. Three or four, I said.

Q. But very time when *when* you would get to a street intersection you could look to your left and, I think, you said you could see a train moving down some distance away?

A. Yes, sir.

Q. In between these street intersections, Mr. McKenzie, were you able to see the train?

A. No, sir.

Q. Do you know of your own knowledge, Mr. McKenzie, what the train did while you were passing between the different street intersections?

A. I know it was impossible to stop, with that many cars.

Q. Do you know of your own knowledge what it did?

A. Nobody knows that.

Q. Do you know of your own knowledge what the train did?

A. I don't know whether it stopped in the middle of a block, but I know it was going at the same speed every time I saw it.

Q. Did you ever work for a railroad?

A. No, sir.

Q. Did you ever run an engine?

A. No, sir.

Q. Have you ever switched cars?

A. No, but I have seen them.

Q. Did you ever handle——

A. I have seen fifty cars moving, and I know it is impossible to pick up that much speed in that short a length. [fol. 63] Q. When you observed the cars down there, as you would go from one street intersection to another, were you able to tell there were fifty cars in that train?

A. I said approximately; I didn't say fifty.

Q. When you saw the train at the first intersection, approximately how many cars did you see at the first intersection when you looked, when you came off the Free Bridge?

A. I couldn't see over two or three in front of me.

Q. When you got to the next intersection how many cars did you see there?

A. The same.

Q. When you got to the next intersection, if that was not Bond Avenue, how many did you see there?

A. The same there. They were always moving.

Q. When you got to Bond Avenue, as I understand it, and turned to the west on Bond Avenue, the rear end of the engine was just passing over Bond Avenue?

A. Yes, sir.

Q. And you drove on up there?

A. Up to the accident.

Q. In driving from Tenth Street you had to go two blocks, or such a matter?

A. I guess it is.

Q. It is the distance from Tenth to Eighth Street?

A. Just to wherever the railroad track is at.

Q. As I understand it, during the time you were going between these different intersections, when you would look you never saw more than six?

A. I didn't say anything about six cars, at no time.

Q. I call your particular attention to that. I do not want to confuse you. Did you say, when you looked at those intersections, you saw two or three?

A. All that you could see from one side to the other.

Q. And the next intersection?

A. The same way.

Q. And the next intersection?

A. The same way.

Q. How many does that make?

A. It don't make six, though; it makes two every time. They were never the same two cars.

Q. You could tell it was not the same two cars?

A. I could——

The Court (to the witness): Was the train in your sight as you were passing the blocks, or only in your sight when you crossed the street intersections?

[fol. 64] A. The train at no time. It was the cars that were in my sight.

Q. You did not see the whole train?

A. I didn't see the engine until I turned into Bond Avenue.

Q. Well, could you see the cars when——

A. No, I said I couldn't see them.

Q. How many cars had crossed Bond Avenue when you got up there?

A. How many? Just the distance it took to go those two blocks. I don't know how many cars; maybe seven or eight or ten.

Q. Was the engine in sight when you first turned two blocks east into Bond?

A. Yes, the hind end of the engine was right in front of me.

Q. Then you had to drive two blocks west: How many cars had gone by then?

A. Well, I am not familiar. I judge ten or fifteen.

Q. How fast were you going?

A. I guess about fifteen miles an hour.

Q. What is the length of those blocks?

A. I don't know.

Q. Have you any idea?

A. No, sir.

The Court: Very well.

Mr. Costello: That is all.

Mr. Miller: That is all.

O. W. Kerewitz, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff, as follows:

Direct examination.

By Mr. Miller:

Q. State your name, please.
A. O. W. Knewitz.
Q. What is your business or profession?
A. Physician and surgeon.
Q. Of what school are you a graduate?
A. Regular.

Mr. Costello: I will admit the Doctor's qualifications.

By Mr. Miller:

Q. Doctor, did you, either on or immediately after March 3rd, 1927, have occasion to examine and treat Edward Walters, the plaintiff in this case?

[fol. 65] A. On the afternoon of March 3rd?

Q. I said, either on or after March 3rd, 1927, did you have occasion to examine and treat the plaintiff in this case?

A. Yes, sir.
Q. Where did you first see him, and when?
A. At St. Mary's Hospital, on the third of March.
Q. About what time of day?
A. Oh, about four o'clock, or four-thirty.

Q. What was his condition as you observed it then; in short, what did you find wrong with him, if anything?

A. He showed considerable shock; was very pale, cold and clammy, and he had a badly crushed right leg, all the way up to the hip. He had some mashed toes on his other foot. He had an abrasion on his head, a scalp wound.

Q. Were there any other injuries to any other portions of his body, Doctor?

A. He had different bruises about his body, but they were minor.

Q. With reference to the crushed condition that you have referred to, of his right leg: Can you tell us a little more about that?

A. It was very badly crushed.

Q. Was the crushed condition composed of a number of fractures, that you referred to?

A. Yes, sir.

Q. About how many fractures, if you are able to state?

A. I couldn't state.

Q. Can you form any estimate or opinion as to the number?

A. No.

Q. Can you fix a minimum on it, Doctor?

A. I know it was so badly crushed that we couldn't say positively that we could save the leg.

Q. Then what did you do with reference to the treatment of that condition of the limb?

A. We amputated the limb at the thigh.

Q. Leaving about how much of a stub?

A. A very short stub.

Q. Approximately how long?

A. Well, possibly four inches, or six; I could'nt say exactly.

Q. With reference to the condition of the left foot, I believe I understood you to say there was some injury to his toes?

A. The foot was crushed and these three toes are off (indicating).

[fol. 66] Q. What three are you referring to, or indicating, rather?

A. The big toe, the small toe, the three toes in between are gone.

Q. The three toes between the big toe and the little toe?

A. Yes, sir.

Q. Were they crushed off?

A. Yes, sir.

Q. Was it necessary to perform any amputation on those?

A. Yes.

Q. What did you do, if anything, with reference to the toes?

A. We had to trim those crushed bones and sew the skin over, like we do any other amputation.

Q. In reference to his head, what did you observe about that?

A. He had a scalp wound right on top of his head.

Q. Doctor, I will ask you if you noticed any bruises or discolorations about his body?

A. He had quite a few bruises over his body, especially one on his chest.

Q. On which side of his chest?

A. I think it was the right side, but I wouldn't be sure.

Q. Now, in reference to other portions of the right side of his body, did you observe any bruises or marks?

A. There were minor bruises.

Q. But were there bruises on the right side of his body?

A. There were bruises.

Q. I will ask you—not to lead you, but did you observe any on his right leg?

A. I think his right leg is gone, isn't it?

Q. I mean, on what was left of the right leg.

A. The right leg was so badly crushed there was——

Q. Did you observe anything on his right hip?

A. It was bruised.

Q. What did you observe with reference to the condition of his right arm, as to whether or not it was bruised?

Mr. Costello: That is objected to as suggestive. I do not mind the leading part, but I object to the suggestions.

Mr. Miller: I will reframe that.

The Court: The questions are leading, all of them.

By Mr. Miller:

Q. We will take his right arm: State what, if anything, you found wrong with that.

A. As I remember, he had bruises on both arms, but no cuts.

[fol. 67] Q. Doctor, how long did he remain in the hospital there?

A. About a month.

Q. Was he then taken home?

A. Yes.

Q. And did you continue to treat him at his home?

A. Yes.

Q. Do you know how long you treated him after that?

A. I saw him at different intervals. I think the last time I saw him was in January, 1928.

Q. January, 1928?

A. Yes.

Q. You say you saw him at intervals from March 3rd, 1927, until January, 1928?

A. Yes, sir.

Q. A period of approximately nine months?

A. About.

Q. I will ask you Doctor, whether or not the injuries that you have related here, with reference to the plaintiff's right leg, and left foot, are permanent in character?

Mr. Costello: We will admit that.

Mr. Miller: That is just what I wanted to get into the record, your Honor. I assumed that he would admit it.

Q. Will the injuries to the left foot affect the ability of the plaintiff to walk upon that foot?

A. He will be able to walk on that foot.

Q. He can walk upon it?

A. Yes.

Q. Would that condition cause any pain?

A. Most certainly.

Q. Now, Doctor, is there anything else that you found about this boy's body as a result of the injuries which he claims to have sustained in this accident, that you have not related?

A. No.

Mr. Miller: I think that is all.

Cross-examination.

By Mr. Costello:

Q. Doctor Knewitz, did you make a record of the injuries that you found on the boy?

A. Not outside of the hospital records, Mr. Costello.

Q. As I understand you, all you found was that his right leg was badly crushed, so that it had to be amputated; on his left foot three toes were crushed off, and he had a scalp wound on the top of his head, was it?

A. Yes.

Q. Describe that wound, Doctor, please.

A. That wound was through the scalp, and about three-quarters of an inch long, as well as I recall.

[fol. 68] Q. Was there any wound on the side of his face, on either side of his face?

A. No.

Q. Are you able to tell, Doctor, from the scalp wound on the top of the head, that you have described, what that was caused from?

A. Evidently some sharp instrument of some kind, or tool.

Q. Was it caused from a blunt instrument, Doctor?

A. It was laid wide open. I couldn't tell.

Q. Could it be caused from a blunt instrument, taking into consideration the kind of wound that it was, and the place where it was upon the head of the plaintiff?

A. It was a pretty deep cut. The edge of the instrument would have to be pretty sharp.

Q. You don't remember that he had any wounds on his arms at all?

A. No wounds; only bruises.

Q. His hip was hurt, was it?

A. Bruised.

Q. Do you remember as to his left side, whether he had any bruises?

A. He was bruised pretty much all over, and they were minor, compared to the other injuries.

Q. What bruises he had were minor?

A. Yes.

Mr. Costello: That is all, Doctor.

Mr. Miller: That is all.

Ruth Sheeley, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Ruth Sheeley.

Q. Speak out loud, now, Ruth, so these gentlemen can hear you. Where do you live?

A. 824 Converse Avenue.

Q. How old are you?

A. Eleven.

Q. You live in East St. Louis, do you?

A. Yes, sir.

Q. What school do you attend?

A. Franklin.

Q. And where is the Franklin School located?

A. Bond.

Q. On Bond Avenue. Near what other street?

A. Eighth.

Q. Did you go to that school in March of 1927?

A. Yes, sir.

Q. What grade are you in now?

A. Fifth.

Q. How long have you gone to that school?

A. I started there when I was in first grade.

[fol. 69] Q. You must speak louder. Have you been going there ever since you started school?

A. Yes, sir.

Q. You are in fifth grade now?

A. Yes, sir.

Q. I will ask you if you were in school on March 3rd, 1927?

A. Yes, sir.

Q. Did you notice anything unusual happening around there on the afternoon of that day?

A. Yes, sir.

Q. Do you know the little Walters boy here?

A. Yes, sir.

Q. I will ask you if you saw an accident there in which he was involved.

A. Yes, sir.

Q. What did you see? Just tell the jury what you observed.

A. I saw some little boys. They just got out of school, and they was coming——

Q. Speak a little louder, Ruth.

A. They were coming along Bond and some of them were running, and one of them—the train was coming, going that way, and four of the little boys got across; about three or four got across, and he didn't.

Q. He didn't?

A. No, sir.

Q. Bond Avenue, as I understand, runs east and west, does it?

A. Yes, sir.

Q. And which direction were they moving in, or walking in, Ruth?

A. East, I think.

Q. East?

A. That way (indicating).

Q. Were they going away from the school?

A. Yes, sir.

Q. Is the school on the west side of the tracks?

A. Yes, sir.

Q. And you say all the little boys got across except one?

A. Yes, sir.

Q. What happened to him?

A. He was hit by the train.

Q. By what part of the train?

A. The engine.

Q. And what happened when he was hit?

A. After he was hit he was knocked on the track and a man came along and picked him up and drug him out from under the train.

Q. Dragged him out from under the train?

A. Yes, sir.

Q. I will show you a picture here, which has been marked "Plaintiff's Exhibit C", and I will ask you if that is a picture of the school that you attend?

A. Yes, sir.

Q. I will ask you if that also shows the railroad tracks there?

A. Yes, sir.

[fol. 70] Q. Does it show the school and the railroad tracks just as they were on March 3rd, 1927? Look that over carefully, and tell me if it does.

A. All except the fence.

Q. Now, in what way does this picture differ from the condition of the fence, as it was the day the Walters boy was hurt?

At this point a recess was had for five minutes, the Court having first duly admonished the jurors as to their proper conduct touching the case while they shall be absent from the court-room.

After the recess, at 4:45 P. M. the hearing progressed as follows:

By Mr. Miller:

Q. Now, I am showing you again what has been marked as "Plaintiff's Exhibit C", and I will ask you to tell me in

what way that differs from the condition of the school-house, the street, the fence, the railroad tracks, and other things about there, from what it was on March 3rd, 1927.

A. The fence is down; it was torn down.

Q. The fence was torn down?

A. It was not down then, just a teacher's gate.

Q. That same fence was up there on March 3rd, that you see in that picture?

A. Yes, sir.

Q. The same kind of fence?

A. Yes, sir.

Q. You say the teachers' gate was down?

A. Yes, sir.

Q. With the exception of the teachers' gate being down, does that picture show everything just as it was on March 3rd, as you saw it on that day?

A. Yes, sir.

Mr. Miller: I now offer in evidence what has been marked "Plaintiff's Exhibit C".

Mr. Costello: I would like to ask one or two questions, your Honor.

The Court: Very well.

By Mr. Costello:

Q. Ruth, calling your attention to the picture that has been marked "Plaintiff's Exhibit C"; I do not know whether you understood Mr. Miller or not, but does this picture show the fence that was there on March 3rd, 1927?

A. Yes, sir.

Q. Does it show all of the fences that were there?

A. No, sir; that back there was down, except——

Q. You say "was down"; you mean there was no fence there at that time, or there was a fence?

[fol. 71] A. There was a fence there.

Q. What kind of a fence was that, Ruth?

A. It was boards, just like that, all the way through.

Q. A solid board fence that ran from this fence near the railroad track, all the way back?

Mr. Miller: I object to counsel's question about the solid board fence. She did not say that.

The Court (to Mr. Costello): You have a right to ask if it was solid, but you can not assume that it was solid. You may ask the question if it was solid.

Mr. Costello:

Q. What kind of a board fence was that?

A. It was about this wide, and had little cracks in between each board.

Q. How much distance was there between each board?

A. About that much (indicating).

Q. Do you know what a half an inch is?

A. Yes, sir.

Q. Was there as much as a half inch between each board?

A. Yes, sir.

Q. And except for that, it was built up all the way back to the school, wasn't it?

A. Yes, sir.

Mr. Costello: We object to that, for the reason that it does not correctly represent the conditions as they existed on March 3rd, 1927.

The Court: Sustained.

Direct examination resumed.

By Mr. Miller:

Q. Ruth, is this exactly the same fence that was there on March 3rd?

A. Yes, sir; all except the back.

Q. All except the back?

A. It was a——

Q. What do you mean?

A. Right back there, where those things are; that was up (indicating on exhibit).

Q. You are speaking of a fence now that was running around by a sidewalk that leads into the building.

A. Yes, sir.

Q. This fence shown in the picture; this fence is exactly the same (indicating on exhibit)?

A. Right about there it was down, but the janitor fixed it.

Q. With reference to this fence I am pointing to in this picture, if that is a picket fence, is that the same kind of fence that was there on that day?

A. Yes, sir.

Q. And the board fence that you referred to, was that running around by that sidewalk?

A. Yes, sir.

[fol. 72] Q. That was up at that time?

A. Yes, sir. Right there was a teachers' gate, and it was open.

Q. How high was that board fence which you speak about?

A. It was about five feet.

Q. Was it as high as you are?

A. About a foot higher.

Q. About a foot higher than you are?

A. Yes, sir.

Q. You have made some reference to the teachers' gate: Where was that teachers' gate? Was the teachers' gate in the board fence that you speak about?

A. Yes, sir.

Q. Where were you standing at the time you saw this accident?

A. Right there (indicating on exhibit).

Q. Are you indicating in the doorway of this school?

A. Yes, sir.

Q. From where you were standing could you look through the open teachers' gate?

A. Yes, sir.

Q. With the teachers' gate closed, could you see through there?

A. No, sir.

Q. With it open, could you?

A. Yes, sir.

Q. Then, as I understand, this fence that we see here in the picture, all that we see here in this picture referred to as "Plaintiff's Exhibit C", was there on March 3rd?

A. Yes, sir.

Q. And the only thing that is left out is a board fence that ran around the sidewalk?

A. Yes, sir.

Mr. Miller: Now, if your Honor please, I offer in evidence again what has been identified as "Plaintiff's Exhibit C".

Mr. Costello: If the Court please, I believe the same objection would hold.

The Court: Oh, yes, I am going to sustain it. It is important here, very important, as to the location of things that are no longer there, and the picture is confusing. I might let it in if I did not know there was one there on the table that shows the very situation. Why you do not use it, I do not know. I am going to sustain the objection. The witness said that she was in a dorway and could look through the teachers' gate, and could see the thing that happened there. Now the teachers' gate is gone. We do not know where it was. It may have an important bearing on the line of vision, from where she was over to where this accident occurred. So, I say, the picture is therefore misleading.

[fol. 73] Mr. Miller: Plaintiff withdraws the offer of "Plaintiff's Exhibit C".

Q. I will show you "Plaintiff's Exhibit A", which has been identified, and ask you if you can see the plank fence in that picture as it was on March 3rd, 1927.

A. Yes, sir.

Q. Now, does the picture identified as "Plaintiff's Exhibit A", show everything, just as it was and just as you saw it on March 3rd, 1927?

A. Yes, sir.

Mr. Miller: If your Honor please, I offer in evidence what has been identified as "Plaintiff's Exhibit A".

Mr. Costello: I will have to ask a few question with reference to this, your Honor.

The Court: Very well.

By Mr. Costello:

Q. Ruth, calling your particular attention to the fence that appears, part of the fence, that appears there: Is that the way that fence was on March 3rd, 1927?

A. No, sir; this was up (indicating on exhibit).

Q. This fence was up, and that wooden fence, that you spoke of a minute ago, was up, from the corner of the building back to this fence, was it not?

A. Yes, sir.

Q. And it does not appear upon this particular picture, does it?

A. This does——

Q. That fence is not up all the way there, there are spaces in it?

Mr. Miller: That is objected to.

The Court: Sustained.

Direct examination resumed.

By Mr. Miller:

Q. Now, what part of the school building were you in when you saw this accident?

A. Where you come right down.

Q. Speak a little louder.

A. Where you come down from the first floor, by those two big doors where you start out to the walk.

Q. Did you go out of the school house after it happened?

A. Yes, sir.

Q. Did you see any other boys around there immediately after this happened?

A. One of those four little boys ran. I saw the others, though.

[fol. 74] Q. Did you see any other boys there that day, besides the plaintiff here, Edward Walters; did you see any other boys who are in the court-room?

A. No, sir.

Q. Do you know Jimmy Goodwin?

A. Yes, sir.

Q. Did you see Jimmy Goodwin that day?

Mr. Costello: That is objected to. She has already answered.

The Court (to Mr. Miller): You can not cross-examine her. Objection sustained.

By Mr. Miller:

Q. Ruth, did you hear any bell ringing before this accident occurred?

A. No, sir.

Q. Did you hear any whistle?

A. No, sir.

Q. Did the train make any stop?

A. No, sir.

Mr. Miller: That is all.

Cross-examination.

By Mr. Costello:

Q. Ruth, you say you are eleven years old at this time?

A. Yes, sir.

Q. And you were how old at the time that the accident happened?

A. About ten.

Q. Do you know how tall you are now, Ruth?

A. About four feet——

Q. And do you know how tall you were at the time of the accident?

Mr. Miller (to Mr. Costello): Let her answer. I think she was going to add a few inches on to the four feet.

Mr. Costello: I do not want to cheat you out of a few inches.

The Witness: Four feet and three inches, I think.

Q. How tall were you at the time the accident happened, on March 3rd, 1927?

A. I don't know.

Q. You had been going to the Franklin School for a couple of years, had you, at that time?

A. Yes, sir.

Q. And on this afternoon in question the school was not out, was it?

A. The first grade was.

Q. But you were not in the first grade?

A. Yes, sir.

Q. Whose room were you in, Ruth?

A. Miss Young's.

Q. Keep your voice up, so this last man can hear you.

A. Miss Young's.

Q. Now, then, where did you say you were when you saw the accident happen?

[fol. 75] A. At the two big doors, where you start to go out in the yard.

Q. How many stories are there to the Franklin School Building?

A. Three, and the basement.

Q. As you go into the entrance to the building, do you walk right in on to the floor of the school?

A. No sir; you go up about six steps to the second floor, or three.

Q. To get down to the basement how do you go?

A. You go about ten steps.

Q. You go about ten steps down to the basement?

A. Yes, sir.

Q. Then there is a landing right as you come into the door, and you either go down, if you go to the basement, and you go up, if you go to the first floor?

A. Yes, sir.

Q. Did I understand you that you were standing on the landing?

A. Yes, sir.

Q. And when you were on the landing you were looking out of these doors?

A. Yes, sir.

Q. What attracted your attention there, Ruth?

A. I was watching the little boys running, just watching them.

Q. How long had you been there?

A. I just came up from the basement, from the steps, and I looked out the door and watched the little boys cross.

Q. Where were the little boys when you first saw them?

A. Right up to the sidewalk, a little bit.

Q. Were they running?

A. Yes, sir.

Q. What sidewalk?

A. The west side of the track. They were at the end of the sidewalk on the west side.

Q. The end of the sidewalk on the west side of the track. On which side of Bond Avenue?

A. West.

Q. You do not understand me, Ruth. Bond Avenue runs in what we call an east and west direction: Were they on the sidewalk, on the side nearest to the school, or were they on the sidewalk on the other side?

A. Nearest the school.

Q. Nearest the school?

A. Yes, sir.

Q. Were they running?

A. Yes, sir.

Q. Were all of them running?

A. I don't know.
Q. What?
A. All but about one, I think.
Q. And how far had you seen them run?
A. About four; they ran across the tracks.
Q. No; how far had you seen them run, Ruth, before they got up to the edge of the sidewalk?
[fol. 76] A. About from our gate.
Q. About from your gate?
A. Yes, sir.
Q. What do you mean by your gate?
A. The girls' gate, where you come out, at the edge of the fence.
Q. What?
A. About at the edge of the fence.
Q. Edge of which fence?
A. By the school.
Q. Up at the school, is there a fence there?
A. Yes, sir.
Q. Is that fence on Bond Avenue?
A. Yes, sir.
Q. And you come out on Bond Avenue. The entrance to the school is on Bond Avenue, is it not?
A. No, sir; you go in at Bond and you turn to the school.
Q. Where do you go in at, with reference to the school building?

The Court (to the witness): Can you answer that question?
A. You go in right about six feet from the first post by the tracks.

By Mr. Costello:

Q. Isn't that where the teachers' gate is?
A. No, sir; the teachers' gate is in the middle of the tracks and the alley.
Q. Between the tracks and the alley?
A. Yes, sir.
Q. What do you mean by the "alley", Ruth?
A. There is Seventh Street, runs along in back of the school, and the tracks in front. Right in the middle of that is the teachers' gate, and the little folks come out of the teachers' gate.

Q. Seventh Street is down on the other side of the school from where the tracks are, isn't it?

A. Yes, but the teachers' gate—the school is right in front of Seventh Street, and the teachers' gate is in the middle of the tracks.

Q. The middle of what tracks? Let us get it straight.

A. The tracks that run along Bond.

Q. Are there tracks that run along Bond Avenue?

A. Between Eighth and Bond; between the school and Eighth Street there is tracks.

Q. Between the school and Eighth Street there are some tracks which run across Bond Avenue, is that right?

A. Yes, sir.

[fol. 77] Q. Where is the teachers' gate with reference to the place where the tracks run across Bond Avenue?

A. There is a store at the end of the school; it is about half way to that store.

Q. It is right in front of the entrance to the school, is it not; that is, the Bond Avenue entrance?

A. Yes, sir.

Q. Then, the teachers' gate, if it is around in front of the school, on the Bond Avenue side——

A. It is where the teachers go in, in the morning; their gate, and——

Q. Their gate is right along the corner, near the railroad tracks, isn't it, Ruth; the teachers' gate?

A. Where we turn in Bond and go up.

Q. I will hand you a picture that has been marked "Defendant's Exhibit 3", and I will ask you to look at that now and state if that represents the school building there.

A. Yes, sir.

Q. Does it represent the Bond Avenue——

A. Yes, sir.

Q. Does it show the railroad tracks there?

A. Yes, sir.

Q. Does it show that oil building that is across the railroad tracks; does this picture represent that?

A. Yes, sir.

Q. Does it show the fence that was around the school there, on March 3rd, 1927——

A. Yes, except——

Q. Wait a minute. Does it show the fence that ran from the fence near the railroad tracks up to the corner of the building?

A. Some pickets were out.

Q. How?

A. Some boards were out of the fence.

The Court: Well, gentlemen, you can not get through the cross-examination of this witness tonight. We will quit until tomorrow morning.

And thereupon, the Court having first duly admonished the jurors as to their proper conduct touching the case while they shall be absent from the court-room, an adjournment was taken until November 14, 1929, at ten o'clock A. M.

Met pursuant to adjournment as above, on November 14, 1929, at ten o'clock A. M.

[fol. 78] Present: Same parties as before.

The following proceedings were had:

Cross-examination.

By Mr. Costello:

Q. Yesterday afternoon, Ruth, we were talking about the fence that extends from the corner of the school building down to the fence that runs alongside of the railroad track: You understand what I mean, the board fence?

A. Yes, sir.

Q. Now, Ruth, how far from the railroad track, or the fence alongside of the railroad track, is this gate that you say was in the board fence?

A. I couldn't say how many feet.

Q. I will ask you, Ruth, if it is not a fact that the opening in the board fence was right at the edge of the fence along the railroad track.

A. No, sir.

Q. Is there not a walk, a concrete walk, or granitoid walk, that leads from the walk that leads down to the fence along the railroad track, and then branches over to Bond Avenue that leads out to the teachers' gate?

A. There is a walk right at the corner by the tracks, where the fence is.

Q. I handed you yesterday a picture that I had marked "Defendant's Exhibit No. 3": I will ask you to look and see if that does not represent the opening that was in the board fence on the third day of March, 1927.

A. No, sir; the gate was down.

Q. When you say the gate was down, what do you mean; was there a gate there?

A. Yes, sir; right there (indicating on exhibit).

Q. You are pointing to a place now that might be either in the board fence, or in the picket fence?

A. It was in the board fence, right across there (indicating).

Q. Up near the door of the school?

A. Yes, sir.

Q. Was there a gate near the door of the school, in the board fence?

A. Yes, sir.

Q. How high did you say that board fence was?

A. It was about a foot higher than my head.

Q. Am I correct in saying, or is it true, that you could not see over the board fence?

A. No, sir.

Q. Is that correct?

A. Yes, sir.

[fol. 79] Q. And the only place that you could see was if there might be an opening in the board fence?

A. Yes, sir.

Q. And if there was not a gate up near the door of the school house, where you were standing, then you couldn't see over the fence, could you?

A. No, sir.

Q. Which direction did you say that the train was running at the time that you saw it?

A. North.

Q. Going north?

A. Yes, sir.

Q. Where was the train when you first saw it?

A. It was about a half a block from the little boy, or less than that.

Q. How much?

A. Less than a half a block from the little boy.

Q. Where was the little boy at that time?

A. On the west side of the walk.

Q. What walk do you mean?
A. West side of the tracks.
Q. On the west side of the tracks?
A. Yes, sir.
Q. And how close to the tracks?
A. I couldn't say how many feet.
Q. About how many feet?
A. Maybe eight or nine; something like that.
Q. Was he past the corner of the picket fence that surrounds the schoolyard?
A. Yes, sir.
Q. He was past the corner of the fence, was he?
A. Yes, sir.
Q. What attracted your attention to the train, Ruth?
A. I just looked out and saw the train acoming.
Q. You just looked out and saw the train coming?
A. I just looked out and saw the train acoming, yes, sir.
Q. Did you wait there all the time until the train got up to Bond Avenue?
A. Yes, sir.
Q. Looking out the window all the time?
A. Yes, sir.
Q. Did you hear the bell on the train?
A. No, sir.
Q. You didn't hear any bell on the train?
A. No, sir.
Q. You testified before in this case, Ruth?
A. Yes, sir.
Q. Do you remember last May, when you were over here as a witness and testified?
A. Yes, sir.
[fol. 80] Q. That was in this same court, wasn't it?
A. Yes, sir.
Q. That was in this same suit?
A. Yes, sir.
Q. I will ask you if at that time Judge Faris did not ask you this question, and if you did not make this answer:

"Q. Did you say they rang a bell or did not ring a bell?"

A. They did not ring a bell.

Q. Wait a minute. And was not this your answer:

"A. They rang a bell a little bit."

Was that question asked you, and did you make that answer at that time, when the Judge asked you that?

A. I think they did ring it a teeny bit, not much.

Q. You think they did ring the bell a teeny bit, now. Which do you think is correct, Ruth, that they did ring the bell a teeny bit, or that you didn't hear any bell?

A. (No answer.)

Q. Do you remember?

A. Yes, sir; they didn't ring it much—they didn't ring it.

Q. What?

A. They didn't ring it.

Q. They didn't ring it?

A. No, sir I didn't hear it.

Q. Then I will ask you this, Ruth: If they didn't ring the bell, why did you answer, last May, when we tried the case, and the Judge asked you if they did ring the bell, that they did ring it?

A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. Is your memory any better about what happened on March 3rd, 1927, now, than it was back on May 8th or 9th 1929?

A. No, sir.

Q. What?

A. No, sir.

Q. You said that the train was going north; with reference to the school building what direction would that be?

A. That way (indicating).

Q. Did it come across Bond Avenue before it passed the school, or was it going the other way; which way was it?

A. It was north.

Q. I know, but I don't know whether we understand just what that means, Ruth, with reference to the directions there. Do you know where the oil refinery is, across on Bond Avenue there?

A. Yes, sir.

Q. Did it pass the oil refinery before it got to the boy?

A. No, sir.

[fol. 81] Q. I think you said you testified before in this case. I will ask you if this question was not asked you, and you did not make this answer at that time, that is, in May, when this case was tried:

"Q. Then, as I understand you now, the engine was going down toward the south?" And did you not answer, "Yes, sir"?

A. I had my directions mixed up. It was going north, but I thought that was south.

Q. You say now that the train was going north?

A. Yes, sir.

Q. Describe the window that you were standing looking out of, Ruth. About how big a window was it?

A. It was about two and a half feet wide, and a little more than a half foot—it was about two and a half feet up and down, and about a little more than a half foot wide.

Q. Was that window in the basement of the building?

A. On the landing, where you start to go up to the first floor.

Q. Where is the window with reference to the doors?

A. It is on the south side, I think.

Q. How many windows were there?

A. There were——

Mr. Miller (to Mr. Costello): You mean in the door? In what side of the building, or what is your question directed to?

Mr. Costello: I mean on the landing, if there were any windows on the landing.

The Witness: There were four in the big doors, but they have got that wood between them, in the middle.

Q. I mean the window that you were looking out of. How many were there like that window that you were looking out of there on the landing?

A. Four.

Q. Four windows like the one that you were looking out?

A. About four.

Q. Was that window a part of the door at all?

A. I don't understand.

Q. Was that window that you were looking out any part of the door?

A. Yes, sir.

Q. Was the window in the door, is that what you mean?

A. Yes, sir.

Q. Then you were looking through the door, instead of through the window?

A. Yes, sir.

[fol. 82] Q. Ruth, I will ask you if at the last time this case was tried, in May, this question was not asked you, and if you did not make this answer;

"Q. Will you take that pencil and mark the spot where you were?

A. Right there at that last space in that window, right there (indicating)."

Was that question asked you and did you make that answer, or do you remember?

A. It was in the door; the window was part of the door.

Q. Just answer yes or no, whether this question was asked you and whether you made this answer:

"Q. Will you take that pencil and mark the spot where you were?

A. Right there at that last space in that window, right there (indicating)."

Was that question asked you, and did you make that answer?

A. Yes, sir.

Q. And was not this question asked you:

"Q. Would that be on the first floor?

A. That would be in the basement."

A. It would not be in the basement, it would be on the landing going down.

Q. Ruth, you must answer yes or no, whether the question was asked and whether you made the answer. Was that question asked you, and did you make that answer?

A. Yes, but I meant on the landing.

The Court (to the witness): That is not the point. You do not get what Mr. Costello is asking you. He is asking you whether, when you testified about this matter before, you did not say that you were in the basement, looking out of a window in the basement. Now, the answer is yes or no. Do you recall whether you made that answer or not?

A. Yes, sir.

Q. You made that answer, you did say before that you were looking out of the basement; is that right?

A. The two big basement doors.

Mr. Costello:

Q. But you did make the answer, is that right? Yes or no; just answer, Ruth, yes or no.

A. Yes, sir.

The Court: She says yes.

(To the witness:) Now you can give any explanation of your answer.

[fol. 83] By Mr. Costello:

Q. You said something about after the boy was struck that a man came and pulled him out from the cars?

A. Someone came through the cars.

Q. How soon was that after the boy was struck, that someone came through the cars?

A. I couldn't tell you.

Q. How many cars had gone over the crossing of Bond Avenue there before anybody came through the cars?

A. I couldn't tell you; I don't know.

Q. Was it right away, or had some time elapsed between the times?

A. I think it was some time.

Q. Did you see any ladies there?

A. Yes, sir.

Q. Could you see the boy after he got struck?

A. You could see a little bit of him.

Q. What part of him could you see?

A. I don't know.

Q. Well, did you see him?

A. I couldn't see him very much. You could just see a little bit of shirt, or something.

Q. What was his position when you could see him there, standing up or lying down or sitting up, or what was he doing?

A. He was lying down.

Q. He was lying down?

A. Yes, sir.

Q. You could see him from where you were?

A. Not very good, you couldn't.

Q. But you could see part of his shirt, from where you were?

A. Yes, sir.

Q. I think that is all.

Redirect examination.

By Mr. Miller:

Q. Just one question more, Ruth. You have spoken in reference to the basement doors: Where are those basement doors with reference to the level of the school yard? I will change that question. Where do the doors, the basement doors, open out to?

A. To the walk.

Q. Now, if you were leaving the basement doors and stepping out into the schoolyard, would you step up or down?

A. Down.

Q. You would step down?

A. Yes, sir.

Q. Then, are these basement doors higher than the level of the schoolyard?

A. Yes, sir.

Q. You, as I understand, were standing on the floor immediately behind what you have referred to as the basement doors?

A. Yes, sir.

Q. Can you look at the windows, or the glass in that window there (indicating window in court-room), and tell us whether or not the glass in the doors were as wide as those [fol. 84] are, or as small as those? Were they as high as those window panes?

A. Yes, sir; I think they are.

Q. Were they as wide as the window panes in that window?

A. No, sir; they had a stick, like, in the middle of those, between each side of the doors.

Q. Do you know what color those windows are painted at the present time?

A. They are white.

Q. When you were referring to looking out of the windows, do I understand you to mean that you were looking out of the glass portion of what you refer to as the basement door?

A. Yes, sir.

Q. To get into the basement, how do you do that, from where you were?

A. To get into the doors?

A. No, to get into the basement?

A. Downstairs?

Q. You have to go downstairs to go down into the basement?

A. About ten steps.

Q. Can you tell us how high the floor is, upon which you were standing, above the surface of the level of the schoolyard?

A. About two feet.

Q. About two feet?

A. Yes, sir.

Mr. Miller: That is all.

Recross-examination.

By Mr. Costello:

Q. How many steps are there that lead from the schoolyard up to the door itself?

A. Three, I think.

Q. Three steps that lead up there?

A. Yes, sir.

Q. As I understood you to say, from where you were you couldn't see over that board fence, could you, on to Bond Avenue; could you, Ruth? Is not that what you said a while ago?

A. Yes, sir.

Mr. Costello: That is all.

Redirect examination.

By Mr. Miller:

Q. From where you were, at the point where you were looking through, did I understand you to say there was a teachers' gate down?

A. Yes, sir.

Q. What do you mean by the teachers' gate being down? Was it torn off, or laying on the ground, or partly hung?

A. It was hanging on the last, the bottom hinge.

Q. If that gate had been closed, or up, could you have seen through it?

A. No, sir.

Q. But, as I understand you, you could see through there with the gate down?
A. Yes, sir.

[fol. 85] Mr. Miller: That is all.
Mr. Costello: That is all, Ruth.

James Goodwin, a witness called in behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?
A. James Goodwin.
Q. Speak right out, James, so these gentlemen can hear you over here. Where do you live James?
A. 908a Brady.
Q. Is that in East St. Louis?
A. Yes, sir.
Q. How long have you lived at that address?
A. I lived there about two years.
Q. You lived there about two years?
A. Yes, sir.
Q. What school do you attend?
A. Franklin.
Q. How long have you been going there?
A. Five; about five.
Q. About five years?
A. Yes, sir.
Q. Did you start in to school there?
A. Yes, sir.
Q. What grade are you in at the present time?
A. I am in 4/2 now.
Q. In 4/2?
A. Yes, sir.
Q. How old are you?
A. Eleven.
Q. Do you remember whether or not you were in school on or about the third day of March, 1927?
A. No, sir.
Q. I will ask you if you observed a collision between a train and a boy, in the vicinity of Bond Avenue, at the point

where it is crossed by the Southern Railway tracks, on or about the third day of March, 1927?

A. I don't understand you.

Q. I will withdraw that question and I will ask you if you saw an accident?

A. Yes, sir.

Q. Near your schoolhouse, about a year and a half ago?

A. Yes, sir.

Q. Where were you at the time that you observed it?

A. I was leaning on a telephone post.

Q. Where was the telephone post that you speak of, with reference to the track?

A. Right next to the walk.

Q. Right next to the walk?

A. Yes, sir.

Q. Where is the telephone pole with reference to the schoolhouse, the Franklin School?

[fol 86] A. I don't quite understand you.

Q. You know where the schoolhouse is?

A. Yes, sir.

Q. Is the telephone post on the same side of the street that the schoolhouse is on?

A. Yes, sir.

Q. Do you know about how far the telephone post is from the first railroad track at that place?

A. About eight or nine feet.

Q. About eight or nine feet?

A. About eight or nine feet.

Q. Now, do you know Edward Walters?

A. Yes, sir.

Q. Did you know him the day this accident happened?

A. No, sir.

Q. I will ask you if you observed him, or saw him, in an accident on that day?

A. Yes, sir.

Q. Just tell the jury what you saw happen there.

A. Well, I was leaning against the post, and there was four boys going across, and this here one, why, they run across, and this one boy he took his time; he walked across, and as he was going, why, a train hit him, and threw him back some.

Q. Which direction were these boys moving in, these four or five boys you refer to?

A. Well, they was going down towards Eighth Street.

Q. They were going down towards Eighth Street?

A. Yes, sir.

Q. Do you know whether or not that would be east?

A. No, sir.

Q. Now, were the four of five boys that you spoke of, were they running or walking?

A. They were running.

Q. Can you tell me what the Walters boy was doing; was he walking or running?

A. He was walking.

Q. Did I understand you to say he was knocked some little distance when he was struck?

A. Sir?

Q. Did I understand you to say that he was knocked some little distance when he was hit?

A. Yes, sir.

Q. About how far; can you tell us, in feet, or can you point out how far he was knocked, from the point where he was struck?

A. He was knocked about from here to—maybe that door there; maybe not that far.

Q. You are indicating about seven or eight feet?

A. Yes, sir.

Q. What did you do, Jimmy, as soon as this happened?

A. Well, I ran back to my boy friend standing there and I told him what had happened.

Mr. Costello (to the witness): Do not tell what you said. [fol. 87] Mr. Miller (to the witness): Do not tell what you said, Jimmy.

Q. Do you know what became of the other little boys who crossed over ahead of the Walters boy?

A. No, sir.

Q. Were those boys younger or older than you?

A. They were younger.

Q. Jimmy, did you see that train stop at any time?

A. No, sir.

Q. I will ask you if you heard any whistle blown.

A. No, sir.

Q. Did you hear the bell ringing?

A. No, sir.

Mr. Miller: I believe that is all.

Cross-examination.

By Mr. Costello:

Q. How old are you now, Jim?
A. Eleven.
Q. When were you eleven?
A. August the 10th.
Q. Where do you live now?
A. 908a Brady Avenue.
Q. 908a Brady?
A. 908a Brady.
Q. Where did you live in 1927?
A. I lived in the same place.
Q. How long have you lived there?
A. About two years.
Q. Two years up to this time?
A. Yes, sir.
Q. Do you know whether March, 1927, was more than two years ago?
A. No, sir.
Q. How many years have you gone to the Franklin School?
A. Five.
Q. Five years?
A. Yes, sir.
Q. Where did you live before the time that you lived at 908a Brady?
A. 914.
Q. Brady?
A. Yes, sir.
Q. Where were you living at the time this accident happened?
A. 908a Brady.
Q. 908a Brady?
A. Yes, sir.
Q. Do you know the Walters boy now?
A. Yes, sir.
Q. How long have you known him?
A. Just since yesterday.
Q. Since yesterday?
A. Yes, sir.
Q. How did you happen to get acquainted with him yesterday, Jimmy?

A. Well, we went to a show and bought our dinner.

Q. How did you happen to be over here yesterday?

[fol. 88] A. Well, I came over here for a witness.

Q. How did you happen to come over, though?

A. Well, a man brought me over.

Q. A man?

A. Yes, sir.

Q. Who was that man, Jimmy?

A. Gene something.

Q. Gene?

A. Yes, sir.

Q. A tall man, with glasses on?

A. No, sir.

Q. A tall, slender man?

A. Yes, sir.

Q. Has he been around here all the time?

A. Yes, sir.

Q. How did he happen to come to get you to come over here?

A. Well, Mr. Miller came over there and wanted to know if I would like to come over, and if I knowed anything about it and I told him I did.

Q. When did Mr. Miller come over there?

A. Monday.

Q. Just this last Monday?

A. Yes, sir.

Q. And where were you at that time?

A. I was out playing, and my sister came and got me.

Q. Had you ever told anybody what you knew about the accident, Jimmy?

A. Well, there was a couple of men came there one time, at my house, and wanted to know if I knowed anything about it.

Q. Do you know who they were?

A. No, sir.

Q. Do you know Mr. Barnes, this man sitting here?

A. No, sir.

Q. Do you remember the time a man came to your house and talked to you and your mother?

A. Yes, sir.

Q. And do you remember what you told the man at that time?

A. No, sir.

Q. Did the man ask you at that time if you had seen the accident?

A. Yes, sir.

Q. I will ask you, Jimmy, if at that time you didn't tell the man that you didn't see it, in front of your mother there.

A. No, sir; I didn't say that.

Q. What?

A. I didn't say it.

Q. What did you tell the man that time, while your mother was there?

A. I told him I knew something about it.

Q. Did he ask you what you knew about it?

A. Yes, sir; and I told him.

Q. Who else did you ever tell about it, Jimmy?

A. No one else, except Mr. Miller.

Q. How did Mr. Miller find out you knew anything about it?

A. I don't know.

[fol. 89] Q. You never testified before, in any of the other trials in this case, did you?

A. No, sir.

Q. And you never told anybody about it, except the man that came to your house there?

A. I told him and Mr. Miller. Mr. Miller was not with them two men.

Q. Who were those two men that came to your house, then?

A. I don't know.

Q. Was that Gene one of them?

A. Yes, Gene was one.

Q. Do you know the other man that was with him?

A. No, sir.

Q. Have you seen him around here since you have been in court?

A. Why, I don't quite remember him.

Q. Is Gene related to the Walters boy, do you know?

Mr. Miller: I submit, that is wholly immaterial to this proceeding, whether or not Gene was related to the Walters boy.

The Court: Well, probably not immaterial, but Mr. Gene, whatever his name may be, is not a witness, and I gather that the information this witness would have about it would probably be hearsay. It is certainly so now. Objection sustained.

To which action and ruling of the Court, defendant, by its counsel then and there duly objected and excepted, and still continues to except.

By Mr. Costello:

Q. Now, then, I will ask you to state, Jimmy, if you know when it was that you first talked to Gene, or Gene and this other man?

A. No, I don't quite remember.

Q. How long ago has it been?

A. About a month ago.

Q. How?

A. About a month ago; maybe more.

Q. Before you talked to them, had you told anybody else about it?

A. My mother and father.

Q. Your mother and father?

A. Yes, sir.

Q. Is your mother here, Jimmy?

A. No, sir.

Q. She did not come over with you?

A. No, sir.

Q. How did you come over this morning?

A. Gene brought me.

Q. Were you going to school on the third day of March?

A. Yes, sir.

Q. Were you in school on that day?

A. Yes, sir.

Q. What grade were you in?

A. In 4/1.

[fol: 90] A. In 4/1?

A. Yes, sir.

Q. What time did this accident happen, Jimmy?

A. Close to 3:30.

Q. Close to 3:30?

A. Yes, sir.

Q. Was school out?

A. Yes, sir.

Q. Were all of the grades out?

A. None of the higher grades were out.

Q. None what?

A. None of the grades in the higher building were out.

Q. What grades were out, Jimmy?

A. Well, my room; Miss Shayne's room, Miss Litner and Miss Donaldson's, and Miss Hasley.

Q. Did you know any of these four boys that you saw go across the track?

A. No, sir.

Q. Did they go to the Franklin School?

A. Yes, sir.

Q. What were you doing standing there and leaning against the post?

A. Waiting until the train got by.

Q. You saw the train, did you?

A. Yes, sir.

Q. What attracted your attention to the train, Jimmy?

A. Well, I was standing there watching the boys, and the train, while it was coming along, and the four boys got across and that one boy didn't.

—. I mean, what attracted your attention to the train; what caused you to see the train, the first time?

A. Why, I was watching the train coming by, too.

Q. And you were about eight or nine feet from the first track?

A. Yes, sir.

Q. The Walters boy was smaller than you, wasn't he?

A. Yes, sir.

Q. How close was the train to the sidewalk there; if the sidewalk would be extended across the tracks, how close was the train to the sidewalk when the Walters boy passed you?

A. Well, I don't know.

Q. Well, the Walters boy had to pass you before he could get in front of the train, did he not?

A. Yes, sir.

Q. How far would he have to go, after he passed you, before he would get to the train?

A. Not far.

Q. Can you give us any idea?

A. Why, I don't know.

Q. How many tracks are there, Jimmy?

A. Three.

Q. Three?

A. Yes, sir.

Q. That is, three sets of tracks?

A. Yes, sir.

Q. What track was this train on, with reference to where you were; the nearest track or the furthest track from you?

A. The furthest track.

[fol. 91] Q. The furthest track from you?

A. Yes, sir.

Q. And the Walters boy had to walk the distance from the telephone post over to the first track, and across the first track and in between, and over the second track onto the third track, did he?

A. Yes, sir.

Q. About how far would that be? Can you point out some place in the court room, about how far that would be?

A. About from here to, maybe the post there (indicating).

Q. This post right here (indicating post at jury box). Which side of the telephone post were you standing on?

A. I was standing on the side next to the walk.

Q. Next to the walk?

A. Yes, sir.

Q. Who else was there?

A. No one else; not near me, not close to me.

Q. Did you see Ruth Sheeley there?

A. No, sir.

Q. Now, which way was the engine on the train facing, or headed?

A. North, going north.

Q. What?

A. It was backing up, I guess.

Q. It was backing up, you guess; do you remember?

A. No.

Q. Do you remember?

A. No, sir; I don't remember.

Q. Was the engine in front, or were the cars in front, Jimmy?

A. There was one car in front.

Q. One car in front of the engine?

A. Yes, sir.

Q. And were there any cars in back of the engine?
A. Yes, sir.
Q. How many cars were there in back of the engine?
A. Well, I don't know.
Q. About how many were there, more than one or two?
A. Yes, sir.
Q. Now, then, what part of the train struck the boy?
A. The back part.
Q. The back part of what?
A. The engine.
Q. The back part of the engine?
A. Yes, sir.
Q. Well, had this car gone by before the engine struck the boy?
A. Yes, sir.
[fol. 92] Q. Then, as I understand you, so as to get this straight, Jimmy, as you stood there you saw the train coming from the south?
A. Yes, sir.
Q. Was it coming from the north or from the south?
A. I don't know.
Q. What?
A. I don't know.
Q. You were looking at it there, Jimmy. Which direction was it coming from, towards your house over on Brady Avenue? You know which direction Brady Avenue is from Bond Avenue, don't you?
A. Yes, sir.
Q. Was it coming from down that way?
A. I don't know; I don't remember.
Q. What?
A. I don't remember.
Q. Don't you remember that?
A. No, sir.
Q. You don't remember whether it was coming from down towards your house, Brady Avenue, or whether it was coming from Market and Trendley and Piggott, down that way?
A. I don't believe it came from down Piggott Avenue.
Q. You don't believe it came——
A. I don't know.
Q. You don't know? Let us see if we can get it right: There was a box car in front of the engine?

A. Yes, sir.

Q. Then there was the engine?

A. Yes, sir.

Q. Then there was a lot of box cars, coal cars and other cars, were there not?

A. Yes, sir.

Q. And the engine came along, whichever direction it was going, and the box car got by the Walters boy, did it?

A. Yes, sir.

Q. And then he walked in front, or the rear end—what do you mean by "the rear end"; do you mean the part of the engine that was in front, or the part of the engine that was in back, that struck the boy?

A. The part of the engine that was in the back.

Q. As I understand it, the box car got by without hitting the boy, didn't it, and most of the engine got by, the rear end of the engine hit the boy, is that right?

A. (Witness nods.)

Q. Do not shake your head; you have to answer out loud.

A. Yes, sir.

Q. Now, you are sure about that?

A. Yes, sir.

Q. Jimmy, I don't know whether I asked you or not, but how far was the end of this box car that was in front of the engine, from the crossing, when you first saw it?

[fol. 93] A. Sir?

Q. How far was the end of the box car, the front end of the box car that was in front of the engine—do you understand what I mean? How far was that from Bond Avenue, when you first saw the train?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. And you were standing there waiting for the train to go by, you said?

A. Yes, sir.

Q. But you don't know in which direction the train was going?

A. North, it was going.

Q. Oh, you know now, do you?

A. Yes, sir.

Q. It was going north?
A. Yes, sir.

Mr. Costello: That is all.

By the Court:

Q. How did those three boys get by; did they go through the train, or around in front of the train?
A. Around in front of it.
Q. Did you see anybody else around there?
A. No, sir.
Q. Were there any men, that you noticed in the street, or any man in the street?
A. There was one on the walk, near by a house.
Q. There was one man there?
A. Yes, sir.
Q. Do you know who he was?
A. No, sir.
Q. How far was the walk from the front of the engine, the walk this man was on?
A. In front of the engine?
Q. Or in front of the train?
A. I don't understand that.
Q. Well, there was a man on the sidewalk, was there?
A. Yes, sir.
Q. How far was that man from you?
A. He was on the other side of this track.
Q. On the sidewalk, on the other side of the track?
A. Yes, sir.
Q. What was he doing there?
A. Waiting until the train got by.
Q. You do not know who he was?
A. No, sir.
Q. You do not know whether he was a train man or not?
A. No, sir.
Q. How far was that wide walk from the front end of the box car; about how many feet?
[fol. 94] A. You mean from the walk to the side of the box car, or the front?
Q. Well, the front end of the box car, or the side of it, either one. Let us get at it another way: This train was on the east track?

A. Yes, sir.

Q. And there is a sidewalk there on the south side of Bond Avenue?

A. Yes, sir.

Q. This man was on the end of that sidewalk?

A. Yes, sir.

Q. How far would that put him from the train?

A. About four or five feet.

Q. Was he the only person you saw about there, except this boy?

A. That was the only man I saw there.

The Court: Very well.

EDWARD WALTERS, being first duly produced, sworn and examined, testified in his own behalf, as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Edward Walters?

Q. Where do you live, Edward?

A. 1622 Goethe Avenue.

Q. Is that in East St. Louis?

A. Yes, sir.

Q. Do you go to school?

A. Yes, sir.

Q. What school do you go to?

A. Monroe School.

Q. Where is the Monroe School located, do you know?

A. Cleveland Avenue.

Q. What school did you attend before you went to the Monroe School? Did you go to any other school before you went to the Monroe School?

A. You mean the Franklin?

Q. You went to the Franklin School?

A. Yes, sir.

Q. Where is the Franklin School?

A. On Bond Avenue.

Q. Do you know where the Southern Railway tracks are, on Bond Avenue?

A. Yes, sir.

Q. Do you know where Eighth Street is on Bond Avenue, where it crosses Bond?

A. Yes, sir.

Q. How old are you, Edward?

A. Eight years old.

[fol. 95] Q. And what grade are you in now?

A. 3/1.

Q. Edward, do you go to church?

A. No, sir.

Q. Do you go to Sunday school?

A. No, sir; I used to went.

Q. You used to go to Sunday school?

A. Yes, sir.

Q. How long did you go to Sunday school, do you know?

A. No, sir.

Q. Well, now, do you know what is meant by the word "Right" and what is meant by the word "Wrong"?

A. Yes, sir.

Q. At Sunday school did they teach you what was right to do, and what was wrong to do?

A. Yes, sir.

Mr. McPheeters: We have not made any objection to the testimony of the boy.

Mr. Miller: Will you admit his qualification?

Mr. McPheeters: We do not admit anything, but we have made no objection to it.

The Court: The burden is upon the plaintiff, since the boy, as it now develops, is eight years old, to show his qualifications as a witness. The law of Missouri, as I construe it, puts that burden on anybody who offers a witness under ten years. If he were over ten years, then the burden to show his lack of capacity as a witness would be on you; since he is under, it is upon the other side, and they must show it by showing his education, and his knowledge of right and wrong; something as to his knowledge of the pains and penalties of perjury, whether it is right to swear a lie, or whether it is wrong to swear a lie, and what will happen to one, both upon a religious test and a criminal test, should be deviate from the truth, and other things, showing ability, capacity, intelligence, and so on. The burden is on Mr. Miller.

By Mr. Miller:

Q. I understand you to say that you did go to Sunday school for a while?

A. Yes, sir.

Q. Now, did I understand you to say they taught you the difference between right and wrong there?

A. Yes, sir.

Q. When you held up your hand and you swore to tell the truth, do you know what that meant?

[fol. 96] A. Yes, sir.

Q. Did you understand that it meant that you have to tell the truth, just as it was?

The Court: You are leading him now, and certainly you ought not to be allowed to lead a witness as young as this one, in order to qualify him.

Mr. Miller: I will try not to lead him, your Honor.

Q. Do you know what a lie is?

A. Yes, sir.

Q. Is it right or is it wrong to tell lies?

A. It is wrong.

Q. Do you know what would happen to one who would tell a lie?

A. Yes, sir.

Q. What would happen?

A. The devil would get him.

The Court (to the witness): What else would happen to him?

A. He would stick a pitchfork through him.

Q. Is there anything else, outside of what the devil did to him, that would happen to him if he swore a lie?

A. He would burn him up.

Q. That is what the devil would do to him; would anybody else do anything to him?

A. Yes, sir.

Q. Who would do it, and what would they do?

A. Give him a spanking.

The Court: Very well. Proceed, Mr. Miller.

By Mr. Miller:

Q. Now, do you remember when you started in at the Franklin School?

A. Yes, sir.

Q. I will ask you, Edward, if you were involved in, or had an accident, on Bond Avenue, near the Franklin School, about one a half years ago?

A. Yes, sir.

Q. Where were you going at the time that happened?

A. I was going home.

Q. Going home?

A. Yes, sir.

Q. How long had you been going to school before that happened?

A. About two or three weeks.

Q. Were you alone, or were some boys with you, as you started home?

A. Some boys with me.

Q. Did you know their names?

A. No, sir.

Q. Do you know whether or not they were in your room at that time?

A. No, sir.

Q. What happened, if anything, when you started across the railroad tracks?

A. The engine hit me.

[fol. 97] Q. What hit you?

A. The engine.

Q. Then what happened after you were struck? When the train hit you what, if anything, did it do to you?

A. It knocked me a little distance.

Q. Knocked you a little distance?

A. Yes, sir.

Q. Do you know where you were knocked after the train hit you?

A. No, sir.

Q. Well, then what happened after that?

A. They took me to the hospital.

Q. They took you to the hospital?

A. Yes, sir.

Q. Do you remember anything, after being hit and knocked that little distance that you referred to?

A. No, sir.

Q. Now, the other boys that you spoke about? What became of them, if you know?

A. Well, they already was down by Eighth Street.

Q. Were those boys ahead of you or behind you?

A. Ahead of me.

Q. At the time that you were struck were you walking or running?

A. Walking.

Q. Do you know what the other boys in front of you were doing?

A. Yes, sir.

Q. What were they doing?

A. They were running.

Q. Did you see this train Edward, at any time before it started across the tracks?

A. No, sir.

Q. You didn't see it?

A. No, sir.

Mr. Miller: I believe that is all, for the present.

Cross-examination.

By Mr. Costello:

Q. Edward, how old are you now?

A. Eight.

Q. You say you had just been going to school about three weeks when this happened?

A. Yes, sir.

Q. Do you remember when it happened?

A. Yes, sir.

Q. What date?

A. March the third.

Q. Did you start to school in March, or when did you start to school?

A. I don't know.

Q. When is your birthday, Edward?

A. April 11th.

Q. April 11th, this year, how old were you?

A. Eight.

Q. Now, do you remember what time you got out from school on this day that you got hurt, Edward?

[fol. 98] A. No, sir.

Q. Do you know whether or not there were any other boys in your room——

A. No, sir.

Q. —that were coming along the sidewalk there with you?

A. No, sir.

Q. How long had you lived down there in that neighborhood, Edward?

A. I never heard you.

Q. How long had you lived in the neighborhood down there?

A. I don't know.

Q. What?

A. I don't know.

Q. You were staying with your father and mother and they lived on Piggot Avenue, did they?

A. Yes, sir.

Q. How long had you lived there before you got hurt?

A. I don't know.

Q. When you came along there, going to and coming from school, you would have to cross over these tracks, would you not?

A. Yes, sir.

Q. You went along Bond Avenue every day, did you not?

A. Yes, sir.

Q. Did you go home to lunch during the day?

A. Yes, sir.

Q. You knew on this day that these tracks were there, did you not, Edward?

A. Yes, sir.

Q. It was daylight?

A. Yes, sir.

Q. You don't remember the time, but it was in the daytime, wasn't it; in the afternoon?

A. Yes, sir.

Q. Now, then, when you came along there on this afternoon, that is, the afternoon that you got hurt, you knew that when you got to the edge of the sidewalk there, there were some tracks across there, did you not?

A. Yes, sir.

Q. You knew that trains ran on those tracks?

A. Yes, sir.

Q. When you got to the sidewalk did you look to see whether a train was coming?

A. No, sir.

Q. You didn't look at all?

A. No, sir.

Q. Did you ever see the train, Edward?

A. Yes, sir.
Q. What?
A. I seen it, sure.
Q. How far was the train from you when you first saw it?
A. One half a block.
Q. And where were you at that time, Edward?
A. In the middle of the track.
Q. In the middle of the track?
A. Yes, sir.
[fol. 99] Q. When you say a half block, in which direction was the train from you; towards Broadway—you know where Broadway is, don't you?
A. Yes, sir.
Q. Was it up towards Broadway, or was it down towards Trendley Avenue, or Market Street?
A. It was up towards Broadway.
Q. It was up towards Broadway?
A. Yes, sir.
Q. Had the engine passed over Bond Avenue at that time?
A. Yes, sir.
Q. And the cars were across Bond Avenue; the box cars, or freight cars, or whatever they were, were they across Bond Avenue, part of them?
A. The engine was across of it.
Q. What?
A. The engine just got across.
Q. The engine just got across Bond Avenue?
A. Yes, sir.
Q. Then what part of the engine struck you, Edward?
A. The front part.
Q. The front part?
A. Yes, sir.
Q. Let me see if I understand you right: You were on the sidewalk that runs along the side of the Franklin School, were you not, Edward?
A. Yes, sir.
Q. On the south side of Bond Avenue, is that right? That is on the south side of Bond Avenue?
A. On this here side (illustrating).
Q. Let us say, for the sake of illustration here, Edward, that Bond Avenue runs in this direction (illustrating).
A. Yes, sir.

Q. Here are the railroad tracks that are along here?

A. Yes, sir.

Q. And there is the school, that is over there where that post would be?

A. Yes, sir.

Q. Then there is a sidewalk on each side of Bond Avenue, is there not?

A. Yes, sir.

Q. And the sidewalk that you were walking along is on the side of Bond Avenue that the school is on; is that correct?

A. Yes, sir.

Q. Now, then, what I want to know is this: You said that when you first saw the train it was a half block away, and then you say that the engine, when you got up to the track was over Bond Avenue. What I want to know, Edward, is where you were on the sidewalk there, or in the neighborhood there, when you first saw the train? Do you understand what I mean?

A. No, sir.

Q. I will try to make it clear to you. The first time that day that you saw this train, where were you when you saw it?

A. On the sidewalk.

[fol. 100] Q. On the sidewalk?

A. Yes, sir.

Q. How far were you from the railroad track?

A. I couldn't tell.

Q. You couldn't tell?

A. No, sir.

Q. Had you got up to the first track yet; I mean, the track nearest to you?

A. Yes, sir.

Q. Were you near that track?

A. Yes, sir.

Q. Then, when you looked and saw the train when you were there at that track, which direction did you look?

A. South.

Q. You looked south?

A. In that direction (illustrating).

Q. Maybe you could tell better by your left hand, or your right hand, which way you looked. Did you look up that way (indicating)?

A. Yes, sir.

Q. Just so we understand it. Up that way, in East St. Louis, would that be up towards Broadway?

A. Yes, sir.

Q. And up towards the library? You know where the library was, the old library?

A. Yes, sir.

Q. That would be up towards Broadway, then?

A. Yes, sir.

Q. And at that time, Edward, as I understand it, the train was a half block down there, was it not?

A. Yes, sir.

Q. Did you keep on walking?

A. Yes, sir.

Q. And you walked over the first track?

A. Yes, sir.

Q. Then did you have to cross another track?

A. Yes, sir.

Q. And then you had to get on to another track, where the train was, did you not?

A. Yes, sir.

Q. From the time that you walked from this first track that you were on; when you first saw the train, until the time when you got across the second track, and over the third track, had the train run from where you first saw it up to Bond Avenue?

A. It was up there by that little house, there, by that little house—it was by that first——

Q. And did you see it all the time?

A. No, sir.

Q. Was there anything to keep you from seeing it, Edward, from the time you first saw it?

A. No, sir.

Q. It is open there, is it not; the tracks?

A. Yes, sir.

Q. And you can look down to the south, or you can look up to the north, and see for a block or so, can you not?

A. Yes, sir.

Q. Will you explain to the jury, then, Edward, what you did when you saw the train, in trying to get across?

[fol. 101] A. I don't understand.

Q. Did you just keep on walking?

A. Yes, sir.

Q. Did the train have an engine on it?

A. Yes, sir.

Q. Where was the engine on the train?

A. In the front of the part.

Q. Was there anything in front of the engine then?

A. No, sir.

Q. How was the engine going, was it headed forward, or was it backing up, or what was it doing?

A. It was going straight.

Q. Do you know what a cow-catcher is?

A. Yes, sir.

Q. I don't know if we have them on freight trains, but the front end, where the headlight is, was that up in front?

A. Yes, sir.

Q. And the rear end of the engine was up towards the box cars, was it?

A. Yes, sir.

Q. Edward, tell the jury if you can, what part of the engine you hit, or hit you, whichever way it was.

A. The front part.

Q. In which direction did it knock you when it hit you?

A. I don't know.

Q. What?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did it knock you down towards the school?

A. I think it knocked me this way, knocked me that way (indicating). You see, the engine hit me there, and then it knocked me over that way (illustrating).

Q. What part of the engine hit you?

A. The front part.

Q. But you were in the middle of the track when the engine hit you?

A. I was on the first line of the track, on the first track—I mean, on this here second track, on the first one.

Q. I am afraid we don't understand that, Edward. There were three tracks along there, were there not?

A. Yes, sir.

Q. When we say "tracks", there are two rails——

Mr. Miller: I submit, if the Court please, counsel for defendant has had this witness go over before, just what track he was on at the time he was struck.

The Court: That may be, but this is cross-examination. He will be permitted to proceed.

By Mr. Costello:

Q. Edward, just so we get it clear now: There are six rails, there are three tracks, are there not?

A. Yes, sir.

[fol. 102] Q. There is one track, which you say that you were on when you first saw the train?

A. Yes, sir; that was the first one.

Q. Then there was a second track?

A. Yes, sir.

Q. Where you on that second track, or any part of it, at the time the engine struck you?

A. Yes, sir.

Q. Were you on the second track?

A. No, sir.

Q. Well, where were you at the time you were struck, if you can tell us; tell us the best you can.

A. The third track.

Q. The third track?

A. Yes, sir.

Q. And what part of the third track were you on at the time you were struck?

A. I couldn't tell that.

Q. Now, then, is you- dad here, Edward?

A. No, sir.

Q. Do you know Mr. Barnes, the man sitting over there back of Mr. McPheeters, with the green shirt on?

A. No, sir.

Q. Edward, let me ask you this: Do you remember a man coming to the hospital, a couple of days after you were hurt, and talking to you, in the presence of your father and mother?

A. No, sir.

Q. You don't remember a man coming there?

A. No, sir.

Q. Do you remember telling a man——

Mr. Miller: I object to that, if you are referring to the same man, anything that was told, because he stated positively he did not remember.

Mr. Costello: All right.

Q. Did you tell your father and your mother, in the presence of this man, just how this accident happened, Edward? Do you remember doing that?

A. I don't understand what you mean.

Q. Did you tell your father and mother, in the presence of this Mr. Barnes, how the accident happened; just a couple of days after it happened?

A. No, sir.

Q. Edward, let me ask you this: Do you know the difference between a freight train and a passenger train?

A. Yes, sir.

Q. What kind of a train was this?

A. A freight train.

Q. How was it running, do you know?

A. No, sir.

Q. Do you know whether it was running fast or slow?

A. I know it was going fast.

Q. You know it was going fast?

A. Yes, sir.

[fol. 103] Q. You know that you were on the track there when the train hit you?

A. Yes, sir.

Mr. Costello: I believe that is all.

Redirect examination.

By Mr. Miller:

Q. When you were asked about directions, a moment ago, did you know what is meant by direction? Do you know what is meant by direction, north, east, south and west?

A. Yes, sir.

Q. Are you able to point out directions; do you know where is north, where is south, where is east, and where is west?

A. Yes, sir.

Mr. Miller: That is all.

Recross-examination.

By Mr. Costello:

Q. I will hand you a picture, which I will have marked "Defendant's Exhibit No. 5", and another one that I will have marked "Defendant's Exhibit No. 6", and ask you to look at "Defendant's Exhibit No. 6", and tell if you know what that is.

A. It is a coal car.

Q. It is a coal car?

A. Yes, sir.

Q. Will you look at "Defendant's Exhibit No. 5", and tell me what that is?

A. I don't know.

Q. Does "Defendant's Exhibit No. 5", show the front part of an engine, or the rear part?

A. The front.

Q. Now, from looking at the two pictures, "Defendant's Exhibits Nos. 5 and 6", which one of them would you say represents the part of the engine that you saw there, that you say struck you?

Mr. Miller: Just a moment, if your Honor please. I submit, the question is unfair, to this extent: That he has not identified either the coal car or any particular part of this particular engine, as striking him.

Mr. McPheeters: That was not the question.

The Court: I think the objection ought to be sustained for another reason. He was not asked about any picture, in his direct examination, and he can not be cross-examined about that.

To which action and ruling of the Court, defendant, by its counsel, then and there duly objected and excepted, and still continues to object and except.

[fol. 104] By Mr. Costello:

Q. Do you know the difference between the appearance of the front end of an engine, and the back end of an engine?

A. Yes, sir.

Q. Now, then, what part of the engine was it that you say struck you?

A. The front part of the engine.

The Court: Let us understand that. (To the witness:) Were you hit by the cow-catcher?

A. Yes, sir.

Q. There was a cow-catcher on the end, that hit you?

A. Yes, sir.

Q. And that cow-catcher was on the front of the train, is that right?

A. Yes, sir.

Q. Do not answer unless you are certain about it. And the train was moving north, was it, or not?

A. Yes, sir.

Q. With the ordinary front part of the train in front, is that right?

A. Yes, sir.

Mr. Costello: If the Court please, the witness did not answer that the train was moving north, on cross-examination. He said that when he looked, he looked to his left, up towards Broadway.

The Court: And Broadway is north?

Mr. Costello: And Broadway is north of Bond Avenue, yes. He said it was up that direction, coming down towards Bond Avenue.

The Court: I so understood him. Now, he says it was going the other way?

Mr. Costello: Yes.

The Court: Is there anything else?

Mr. Costello: That is all we care to ask him.

Mr. Miller: That is all.

Benjamin F. Ward, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the plaintiff as follows:

Direct examination.

By Mr. Miller:

Q. Will you state your name, please?

A. Benjamin F. Ward.

Q. Where do you live, Mr. Ward?

A. 316 South Eighth Street, East St. Louis.

[fol. 105] Q. How long have you lived in East St. Louis?

A. About seventy-two years.

Q. What is your business or occupation, Mr. Ward?

A. My business at the present time is a filling station business.

Q. How long have you been in that?

A. A little over three years.

Q. Where is that located?

A. At Eighth and Bond.

Q. Eighth and Bond Avenue?

A. East St. Louis.

Q. On what corner, Mr. Ward?

A. On the northeast corner.

Q. I show you what has been marked and introduced in evidence as "Plaintiff's Exhibit B", and will ask you to look at that picture and point out where your place of business is.

A. Right here (indicating on exhibit).

Q. Is that your place of business, identified by the sign "Ward's"?

A. Yes, sir.

Q. Now, on the third day of March, 1927, about 3:30 in the afternoon, were you in the vicinity of Eighth and Bond Streets?

A. Yes, sir; I was in front of my place, filling a car with gasoline.

Q. I will ask you if you witnessed an accident there between a train of the Southern Railway Company, and a boy by the name of Edward Walters.

A. Yes, sir.

Q. Will you state just what you saw, Mr. Ward?

A. Well, the first I knew of it I heard a scream out of a woman, and I looked over and saw the child in under the car. There had been about one or two cars and the engine, had passed over him.

Mr. Costello: I object to that. That is a conclusion of the witness.

The Court: I did not hear his statement.

Mr. Costello: He said the first thing he heard was the scream, and he looked over and saw the child under the car, and then he followed it by saying that there were one or two cars and the engine had passed over him.

The Court: Yes, unless he saw it; if he saw it first when he heard the scream, then I can not understand how he could see that one, two, three, four, five, six, or any num-

ber of cars had passed over him. I shall sustain the objection.

[fol. 106] By Mr. Miller:

Q. Mr. Ward, at the time when you observed, or heard this scream, I will ask you if you were able to see, or to identify, where the engine was at the time you first observed the scream.

A. The engine was right back of the shed opposite my place.

Q. Is that shack shown in the picture that I have just shown you?

A. Well, a house, I guess—a house right on the corner, and this shed is behind it.

Q. The shed is behind it?

A. Yes, sir.

Q. What did you see or observe there at the time, that suggested to you the presence of a locomotive, or a train?

A. I saw the exhaust coming out of the smokestack of the engine.

Q. You said it was behind this shack or shanty—shed, I believe you referred to. In what direction is that shack from your place of business?

A. Well, it is a little northwest, just a least bit.

Q. A little northwest?

A. Yes, sir.

Q. Have you ever done any railroading in your life?

A. I ran a locomotive for seventeen years.

—. Are you familiar with the length of box cars?

A. Yes, sir.

Q. And coal cars?

A. Yes, sir.

Q. Are you familiar with the width of Bond Avenue, about?

A. I ought to be, yes

Q. From where you first observed this smoke coming up on the other side of the shack, can you tell us approximately how many cars had passed over Bond Avenue?

—. —.

Q. The engine and one car?

A. Yes, sir; engine and one car.

Q. Where did you see the boy lying, that you have spoken of?

A. I saw him lying under the car, on the west rail.

Q. The west rail?

A. The west rail, and the track that was nearest to me.

Q. Was that a southbound or northbound track?

A. Well, that was the northbound track.

Q. Was he west of the west rail, or east of the west rail?

A. He was on the west rail of the east track, the first rail to the west.

Q. Let us get at it this way: As that train went north, did it proceed north on the first set of tracks from you?

A. From me, yes; the first set of tracks.

Q. The boy was on the west rail, or second rail, of that track?

[fol. 107] A. The rail farthest away from me.

Q. And how far was he from the south curb, if you noticed?

A. The south curb?

Q. The sidewalk, yes.

A. About six and a half feet.

Q. Did you observe that train stop at any time?

A. No, sir.

Q. Did you observe, or make an estimate of the approximate number of cars in the cut that was being hauled?

A. Well, I don't know how many cars there was in the train, but I know it was a long train. I would judge about forty or forty-five cars; maybe fifty.

Q. In your experience as a railroad man, have you ever driven an engine and operated one as an engineer?

A. Yes, sir.

Q. Are you familiar with the type of engine that was in use upon these tracks by the Southern Railroad Company, on March 3rd, 1927?

A. Well, the only difference between the engines, they are a little bit bigger than what I used to run. They are larger than what I used to run. The biggest engine I ever ran was a sixty-five ton engine.

Q. With reference to grade: Is there any grade, coming from Trendley Avenue up to Bond?

A. It is downhill all the way from the I. C. junction to Tenth Street.

Q. It is downhill all the way from the I. C. junction to Tenth Street?

A. Yes, sir.

Q. About what was the speed of the engine, if you are able to estimate it, or determine it, when you first observed it?

A. Going between twelve and fifteen miles an hour.

Q. Did you notice the cars as they passed?

A. Yes, sir.

Q. I will ask you whether they maintained any different rate of speed, or approximately——

A. The same rate of speed right on through.

Q. Now, taking into consideration the grade, if any, at that point; the type of engine being used; the number of cars being hauled, what distance would it require to get up a speed of twelve or fifteen miles an hour, hauling forty or forty-five cars, under those circumstances and conditions as present on that afternoon of March 3, 1927?

Mr. Costello: Just a minute, Mr. Ward. We object to that, your Honor, for the reason that it implies that Mr. Ward saw the type of engine that was being used, and, according to his own testimony, he did not see it.

[fol. 108] The Court (to the witness): Did you actually see the engine?

A. I saw the smokestack and the cab. That is all I saw of it—the top of the cab. But I am very well acquainted with the class of engines that they are using.

Q. But you have had no actual experience in operating such an engine as this was?

A. Not of that capacity; no, sir.

The Court: I think I ought to sustain the objection.

By Mr. Miller:

Q. Before March 3rd, 1927, had you ever had occasion to observe the kind of switch engines that were in use on and over those tracks of the Southern Railroad?

A. Yes; I see them every day; every hour in the day.

Q. Have you seen them since the third day of March, 1927?

A. Yes, sir.

Q. Have you noticed any change in the type of engine used there, in switching operations by the Southern Railroad Company?

A. No, sir.

Q. Now, taking into consideration the type of engines that you have observed in constant use, both before and since the third day of March, 1927; also taking into consideration the grade, if any, at Bond Avenue, where it is crossed by the Southern Railroad tracks; taking further into consideration a cut or haul of approximately forty or forty-five cars, what distance would be required to get up a speed of twelve or fifteen miles an hour, under those circumstances?

Mr. Costello: That is objected to for the same reason we stated before. Mr. Ward has never had any experience in handling engines of the type that was being used on this date.

The Court: I do not think he could tell merely by looking at such an engine. He has never run one; never operated one. He does not know how fast they go; he can not know, because of his lack of operation. He can not tell how fast their pick-up, and so on. I think I ought to sustain the objection.

By Mr. Miller:

Q. From the speed that you observed, of the moving box cars, and from your experience as a railroad man, I will ask you whether or not, in your judgment, a train of that many cars, containing forty or forty-five cars, could [fol. 109] have made a stop at the south side of Bond Avenue, and reached the speed of twelve or fifteen miles an hour, three or four car lengths north of Bond Avenue.

Mr. Costello: We object to that, your Honor, for the reason stated before.

The Court: This witness has not, in my opinion, qualified, for reasons that I have already stated; not having qualified, he is in no better position to testify, or to give an opinion about it, than an ordinary layman, that is to say, than the jury itself. So, I ought to sustain the objection. If you insist, however, I will suggest that it is your case, and not mine. You have asked him three times, and I have sustained the objection. I do not think I shall do it again.

By Mr. Miller:

Q. When you got over to the crossing, what, if anything, did you do, and what did you see there?

A. I saw a lady coming by and grab him by the arm, drag him off, and then a gentleman crossed the train from where I was, and helped her carry the boy over to the side of the sidewalk, right at the stand that they had left standing there, the gate stand.

Q. Are you familiar with the general surroundings of what is known as the Franklin School, Mr. Ward?

A. Yes, sir.

Q. Have you been on the school premises?

A. I was engineer there for twenty-eight years.

Q. Have you ever been in that school building, and around that school building?

A. Yes, sir.

Q. Do you know where the entrance is, what is known as the basement entrance?

A. Yes, sir.

Q. What is its height, with reference to the level of the surrounding ground or yard there?

A. Well, the schoolhouse sets up on a terrace, and the sidewalk gradually goes up to it, and from the sidewalk up to the inside of the building is about two feet. There is two different steps; I would judge two feet.

Q. Did you hear any whistle blown at any time before you observed this train?

A. No, sir.

Q. Did you hear any bell rung?

A. I don't remember any; I didn't hear it.

Mr. Miller: I believe that is all.

Cross-examination.

By Mr. Costello:

Q. Mr. Ward, how long do you say you have lived in the vicinity of Eighth Street and Bond Avenue?

[fol. 110] A. Well, I was there since '90, about forty years.

Q. Then you are familiar, as you stated, with the surroundings there?

A. Yes, sir.

Q. I will ask you, Mr. Ward, to look at the picture which I have had marked "Defendant's Exhibit No. 3", and state what that represents, if anything.

A. That represents the Southern Railroad crossing that crosses over Bond Avenue, and the Franklin School.

Q. Does that picture represent the conditions of the Southern Railroad crossing and Bond Avenue, as they existed on March 3rd, 1927?

A. Yes, sir.

Q. Does that picture show the watchman's tower, that you referred to?

A. Yes, sir.

Q. Was there a watchman's tower there on March 3rd, 1927?

A. There was a watchman's tower there; yes, sir.

Q. Were the gate posts there on March 3rd, 1927?

A. I believe they was; I think they were.

Q. Now, Mr. Ward, as I understand it, you were over at your filling station?

A. Yes, sir.

Q. And that is located on the northeast corner of Eighth Street itself, and Bond Avenue?

A. Yes, sir.

Q. Is there not a difference between what we refer to as the Eighth Street crossing of the Southern Railroad, and Bond Avenue, and Eighth Street and Bond Avenue?

A. How is that?

Q. Is there not a difference between what we refer to as the Eighth Street crossing of the Southern Railroad, at Bond Avenue, and Eighth Street and Bond Avenue?

A. There is a difference of eighty-six feet; a little over eighty-six feet.

Q. Which direction are the railroad tracks from Eighth Street?

A. They are west of Eighth Street.

Q. Do the railroad tracks there, where they cross Bond Avenue, run parallel with Eighth Street?

A. Yes, sir.

Q. Now, then, Mr. Ward, how much of a grade is there that you referred to, from the I. C. crossing down to Tenth Street?

A. I don't know just exactly the grade, but I know it is down-hill from the I. C. Tenth Street.

Q. By "down-hill", what do you mean by that?

A. There is a gradual slope from Tenth Street to the I. C. crossing.

[fol. 111] Q. How much difference would you say there is in the level of the track at Tenth Street crossing and the level of the track at the I. C.?

A. Well, I would judge about fourteen feet; maybe fifteen.

Q. Fifteen feet?

A. Yes, sir.

Q. And how much distance is that, Mr. Ward?

A. Well, it is a difference of fifteen feet in the lines; maybe it is more, maybe it is twenty.

Q. I mean, the distance between those two points, the I. C. crossing and the Tenth Street crossing?

A. Well, that is about eight blocks, I should judge.

Q. Then you mean that, in eight blocks, there is a descent from the I. C. crossing to the Tenth Street crossing, of from fifteen to maybe twenty feet?

A. Yes, sir.

Q. Mr. Ward, I will ask you to look at a picture that has been marked "Defendant's Exhibit No. 2", and state what that represents.

A. Well, that represents——

Q. Keep your voice up, so all these men can hear you.

Mr. Miller (to the witness): Speak louder.

A. This represents the Southern Railroad as it passes north and south, west of Eighth Street.

By Mr. Costello:

Q. And can you tell the jury, Mr. Ward, in which direction that picture faces, or which direction it shows there?

A. Well, that would be facing south, I presume, but the picture was taken from here (indicating).

Q. Does that picture known as "Defendant's Exhibit No. 2" represent the condition of the Bond Avenue crossing and the Southern Railroad, and the tracks of the Southern Railroad as they existed on March 3rd, 1927?

A. Yes, sir.

Q. Mr. Ward, I will ask you to state if you know who the party was that you were serving at the time you heard the lady scream?

A. Mr. Heher.

Q. Mr. Heher?

A. Yes, sir.

Q. How far from Bond Avenue is the pump that you were serving Mr. Heher from, or how far was it, on March 3rd, 1927?

A. Well, I should judge about eighteen feet.

Q. From Bond Avenue?

A. Bond Avenue.

Q. In which direction?

A. Well, it would be a little north of Bond.

[fol. 112] Q. How far is it east of Eighth Street?

A. Let me see: That would be about, oh, I suppose twenty or twenty-two feet.

Q. Do you remember which pump you were serving him from?

A. Yes, sir.

Q. Which pump was it, Mr. Ward?

A. The south pump.

Q. The south pump?

A. Yes, sir.

Q. That would be the pump nearest to Bond Avenue?

A. That would be the pump nearest to Bond Avenue.

Q. What is there on the northwest corner of Eighth and Bond Avenue?

A. Northwest?

Q. Yes.

A. There is a confectionery there.

Q. How high a building is that, with reference to the stories?

A. I presume it is twenty feet high.

Q. Next to the confectionery, to the north, on the west side of Eighth Street, what is there?

A. Why, there is a four and a half frame building.

Q. Next to that, to the north, what is there?

A. A two-story building.

Q. Is it all built up along in there, Mr. Ward?

A. Well, there is a space between the houses.

Q. Yes, but——

A. It is built up; yes, sir.

Q. Now, then, how far did you say the boy was from the sidewalk when you looked over there from your filling station, and saw him?

A. From where I was standing, to where the boy was laying?

Q. No, how far was the boy lying from the sidewalk?

A. Oh, from the edge of the sidewalk?

Q. When you looked over and saw him.

A. About six and and a half feet.

Q. Was he out in the street?

A. Yes, just about six and a half feet from the south line of Bond Avenue sidewalk.

Q. How far would that be from the curbline of the south side of——

A. That is the curbline, the sidewalk line, the curbline.

Q. Is there any space between the curbline? That is what I want.

A. Oh, yes; there is two and a half feet, I believe.

Q. How far would it be from the curbline?

A. Well, about six and a half feet.

Q. How wide is Bond Avenue?

[fol. 113] A. Bond Avenue is sixty feet.

Q. From curb to curb, how wide?

A. About sixty, I believe.

Q. Sixty feet wide?

A. Yes, sir.

Q. The building that you have identified as being on the northwest corner of Eighth and Bond, how close does that set to Bond Avenue, or to the north curbline of Bond Avenue?

A. Set in from the curbline?

Q. Yes.

A. That is about eighteen feet, I should judge; it may be twenty.

Q. As to the picture that you identified as "Plaintiff's Exhibit B", Mr. Ward, do you know where the camera was at the time that picture was taken?

A. Do I know what?

Q. Do you know where the camera was located at the time that picture was taken?

A. No, I don't. It must have been taken from the——

Q. No, don't answer, if you don't know, Mr. Ward. I will hand you a picture that has been marked "Defendant's Exhibit M 1", and ask you to look at it and state what that is.

A. That is a picture taken from——.

Q. Keep your voice up so we can hear you.

A. From the west.

Q. Does that show Bond Avenue, looking towards the east?

A. Yes, sir.

Q. Does it show all the way up to Tenth Street?

A. Yes, sir.

Q. The building that appears to be out toward the center of Bond Avenue, at the top of the street, as it appears on the picture, is that the fire engine house?

A. No, sir.

Q. Does this picture show the confectionery store there?

A. Yes; there it is (indicating on exhibit).

Q. Does it show the shack just in the rear of the confectionery store?

A. Yes, sir.

Q. Does it show your filling station?

A. No, it don't show my filling station there.

Q. Does it show the small building on the southeast side of the tracks?

A. Yes, sir.

Q. And it also shows the watchman's tower?

A. Part of it.

Q. And the gate posts?

A. Yes, sir.

Q. Does that picture correctly represent the conditions as they existed on March 3rd, 1927?

[fol. 114] A. Well, that picture represents the conditions that it was taken in.

Q. Just a minute; answer the question. I am not asking you where it was taken, but does it represent the conditions and surroundings there as they existed on March 3rd, 1927?

A. As far as the picture is concerned, it represents the parts of the street from where the man took the picture from.

Q. Does it show all of the buildings, sheds, gateposts, the street, track, tower, and everything, as they existed on that day?

A. Yes, sir.

Q. Mr. Ward, I will ask you to look at a picture that has been marked "Defendant's Exhibit No. 4", and to state what that is.

A. That is a picture taken from south, I believe, isn't it?

Q. I do not want to answer you. Can you tell from the surroundings there, and the buildings, what direction that picture is facing, where the camera was——

A. Taken from here, I guess (indicating on exhibit).

Q. It looks in which direction?

A. South.

Q. I will ask you, Mr. Ward, if it does not show the refining company's plant, that is located on the northwest side of the tracks, and if it is not looking toward the north, up the railroad tracks; is that correct?

A. Yes, sir.

Q. And does it show the shack that you mention, that is in the rear of the confectionery store?

A. It shows that one right behind the confectionery.

Q. Does it show the tracks of the Railroad Company, extending to the north of Bond Avenue?

A. Yes, sir.

Q. Does that picture, which has been marked "Defendant's Exhibit No. 4", correctly represent the conditions and surroundings as they existed there on March 3rd, 1927?

A. Yes, I believe that it does.

Mr. Costello: That is all.

Redirect examination.

By Mr. Miller:

Q. In reference to "Plaintiff's Exhibit B", I will ask you if, from where you were standing, the house over which you stated you saw the smoke coming from the engine, was it this house that I am pointing to, on the left side of the picture identified as "Plaintiff's Exhibit B"?

A. Yes, sir; that is right.

Mr. Costello: I think it would be no more than fair to counsel for plaintiff, if we allowed him to examine these [fol. 115] pictures that we have, that his witness identified, so that he cares to ask any questions about them, he might do so. I can not offer them in evidence now, but I am willing, if he wants them——

The Court: Under the circumstances, you may offer them in evidence, as part of the cross-examination of Mr. Ward.

Mr. Costello: I offer then, in evidence, "Defendant's Exhibits——

The Court: I do not know to what picture Mr. Miller referred in his last question, whether it was one that has been offered already, or one which has not been offered.

Mr. Miller: It was "Plaintiff's Exhibit B", which has been offered already.

Mr. Costello: I offer in evidence, your Honor, "Defendant's Exhibits Nos. 1, 2, 3, and 4".

Mr. Miller: May I show you what has been marked "Defendant's Exhibit No. 3", and ask you to state whether or not this tower was there on March 3rd, 1927, if you know?

A. Well, I believe it was there yet. They had taken away the watchman——

Mr. Costello: We object to the last part, and ask that the last part be stricken out. He said that they had taken away the watchman. That is not responsive to the question.

The Court: No, it is not. It is ordered stricken out.

By Mr. Miller:

Q. On March 3rd, 1927, did they have a watchman at that crossing of the Southern Railroad?

A. No, sir.

Q. But they had one there before that?

A. Yes, sir.

Mr. Costello: That is objected to. It is immaterial, irrelevant, and incompetent.

The Court: Yes, to the issues here it is wholly immaterial and misleading, and perhaps confusing, because counsel for both sides, in the opening statements to the jury, said precisely and concisely what the situation was; that there had been a watchman there, but that by orders they were permitted to take that watchman away. So, it is no longer relevant here. They were to establish in lieu thereof, a system of stopping and flagging trains. It is confusing, and ought not to be in this case. It has nothing to do with [fol. 116] it, whether there had been or had not been. Objection sustained.

Mr. Miller: That is all.

Mr. Costello: That is all.

Mr. Miller: Now I want to offer some exhibits here, and then I shall rest.

I now desire to offer in evidence and read from what has been identified as "Plaintiff's Exhibit G", an order of the Interstate Commerce Commission of the State of Illinois.

Mr. Costello: There is no objection to that on the part of the defendant, to the offer of "Plaintiff's Exhibit G", and we desire to state that it is admitted that, prior to the formulation of "Plaintiff's Exhibit G", a petition had been filed with the Illinois Commerce Commission, asking for permission to remove the gates, and that "Plaintiff's Exhibit G", was formulated by the Illinois Commerce Commission on the twentieth day of October, 1926, and was in full force and effect on March 3rd, 1927.

(To Mr. Miller:) Does that cover it all right?

Mr. Miller: Yes.

Gentlemen, I will read to you what has been identified here as "Plaintiff's Exhibit G".

PLAINTIFF'S EXHIBIT "G"

"It Is Further Ordered that upon the discontinuance of said crossing watchmen and crossing gates at Trendley Avenue and Bond Avenue in the City of East St. Louis, the said Southern Railway Company shall protect said crossings by requiring all of its trains before passing over said crossings to come to a stop and to require one of the crew of such trains to flag said crossings and warn all persons attempting to cross said crossings, of the approach of said trains.

By order of the Commission *of* Springfield, Illinois, this 20th day of October, 1926.

(Signed) Julius Johnson, Secretary. (Seal of Illinois Commerce Commission.)"

[fol. 117] "State of Illinois, Illinois Commerce Commission

Certificate

I, Julius Johnson, do hereby certify that I am Secretary of the Illinois Commerce Commission of the State of Illinois and keeper of the records of said Commission.

I further certify that the above and foregoing is a true, correct and complete copy of the last two paragraphs of page 3, the last page of an order made and entered of record by said Commission in case 16587 on the 20th day of October, A. D. 1926.

Given under my hand and the seal of said Illinois Commerce Commission at Springfield, Illinois, this 6th day of February, A. D. 1928.

(Signed) Julius Johnson, Julius Johnson, Secretary. (Seal of Illinois Commerce Commission.)"

"United States of America,
State of Illinois, ss:

Office of Secretary of State

I, Louis L. Emmerson, Secretary of State of the State of Illinois, hereby certify that Julius Johnson is now, and has been since 2nd day of July A. D. 1921 Secretary of the Illinois Commerce Commission in The Department of Trade and Commerce State of Illinois duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestation.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 8th day of February, A. D. 1928.

(Signed) Louis L. Emmerson, Secretary of State.
(Seal of the State of Illinois.")

Mr. McPheeters: The appointment of the next friend may be admitted, as we did at the former trial.

Mr. Miller: Of Herman Walters?

[fol. 118] The Court: It is admitted that Herman Walters acts herein for Edward Walters, a minor, and that he has heretofore, before the institution of this suit been duly qualified as next friend for said minor.

Mr. Miller: Plaintiff rests, your Honor.

Plaintiff Rests.

At this point the jurors were excused until two o'clock P. M., the Court having first duly admonished them as to their proper conduct touching the case while they shall be absent from the court-room.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Thereupon the defendant offered and filed the following request for an instruction, and prayed the Court to instruct the jury as follows:

The Court instructs the jury that under the pleadings and the evidence adduced by plaintiff, your verdict should be for the defendant.

Which said request for said instruction, offered and filed by the defendant, was orally argued to the Court, and was by the Court denied, and the Court refused to give the said instruction, and to the action of the Court in refusing to give said instruction, the defendant, by his counsel, then and there, at the time, duly excepted.

At this point a recess was had until two o'clock P. M.

After recess, on November 14, 1929, the following proceedings were had at two o'clock P. M.

And thereupon the defendant, to sustain the issues in its behalf, offered the following evidence:

FORREST CRAWFORD, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. You may state your name.
A. Forrest Crawford.
Q. Where do you live, Mr. Crawford?
A. East St. Louis.
Q. What is your business or occupation?
A. Commercial photographer.
Q. How long has that been your business?
[fol. 119] A. Fifteen years.
Q. During that time have you had occasion to take pictures of different scenes and surroundings?
A. I have.
Q. I will ask you, Mr. Crawford, if in the month of March, 1927, you had occasion to take some pictures of the surroundings of the Southern Railroad crossing and Bond Avenue, in the City of East St. Louis.
A. I did.
Q. I will show you a picture that has been marked "Defendant's Exhibit No. 1", and ask you to state if that was taken by you.

A. It was.

Q. When was the picture taken?

A. March the 9th, 1927.

Q. I will show you a picture that has been marked "Defendant's Exhibit No. 3", and ask you to state if that picture was taken by you?

A. It was.

Q. When was that picture taken?

A. The same day.

Q. I will hand you a picture that has been marked "Defendant's Exhibit No. 3", and ask you to state if that picture was taken by you.

A. It was.

Q. When was that picture taken?

A. The same day.

Q. I will hand you a picture which has been marked "Defendant's Exhibit No. 4", and ask you to state if that picture was taken by you?

A. It was.

Q. When was that picture taken?

A. The same day.

Q. Do all of those pictures, Nos. 1, 2, 3, and 4, being "Defendant's Exhibits Nos. 1, 2, 3, and 4,- correctly represent the conditions and surroundings as they existed on that day?

A. They do.

Q. I will hand you what have been marked "Defendant's Exhibits Nos. 5 and 6." Referring to No. 5 first, I will ask you to state what that represents.

A. That is the front end of engine No. 1894, of the Southern Railroad Company.

Q. Where was that picture taken, Mr. Crawford?

A. At the roundhouse of the Southern Railroad.

Q. Located where?

A. At 4200, near Bond.

Q. What city?

A. East St. Louis.

Q. When was that picture taken?

A. March the 9th.

Q. What year?

A. Of 1927.

Q. I will ask you to state, Mr. Crawford, if that picture, known as "Defendant's Exhibit No. 5," correctly repre-

sents the front end of engine 1894, as it existed at the time that picture was taken?

A. It does.

[fol. 120] Q. I will hand you a picture which has been marked "Defendant's Exhibit No. 6," and ask you to state what that is.

A. That is a picture of the tender, or rear of engine 1894, of the Southern Railroad Company.

Q. When was that taken by you, Mr. Crawford?

A. On March the 9th, 1927.

Q. Was exhibit No. 6 taken at the same time that Exhibit No. 5 was taken?

A. Yes, sir.

Q. Does the picture known as "Defendant's Exhibit No. 6," correctly represent the condition of the rear end or tender of engine No. 1894, at the time the picture was taken?

A. Yes, sir.

Mr. Costello: I now offer in evidence "Defendant's Exhibits Nos. 5 and 6." "Defendant's Exhibits Nos. 1, 2, 3 and 4" are already in evidence. You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. I believe that all these photographs were taken within less than a week after the accident occurred?

A. They were taken on March the 9th.

Mr. Miller: That is all.

Mr. Costello: That is all, Mr. Crawford.

G. W. Lane, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. Mr. Lane, speak out loud enough so that all these men can hear you, please. You may state your name.

A. G. W. Lane.

Q. Where do you live?
A. 2642 Renshaw Ave., East St. Louis.
Q. What is your occupation?
A. Engine foreman, Southern Railway.
Q. How long have you been so employed?
A. You mean, in service with the Southern?
Q. Yes.
A. In service eleven years.
Q. Were you working for the Southern Railway Company on the third day of March, 1927?
A. Yes, sir.
Q. Were you a member of a switching crew on that day?
A. Yes, sir.
[fol. 121] Q. Which engine did the crew have on that day, do you remember?
A. 1894.
Q. Are you familiar, and were you familiar, with that engine?
A. Yes, sir.
Q. Mr. Lane, I will ask you if your crew, and that engine, had occasion to cross over Bond Avenue, at the place where the Southern Railway tracks cross Bond Avenue, on March 3rd, 1927.
A. Yes, we did.
Q. I will ask you to state, at the time you passed over Bond Avenue, how many cars were in your train.
A. Fifty cars.
Q. Where had your train started from?
A. Started from?
Q. Yes.
A. The Dyke Yards.
Q. And where was your train going to?
A. Coapman Yards.
Q. As you approached Bond Avenue, Mr. Lane, I will ask you to state the direction in which the engine was headed.
A. The engine was headed south.
Q. By that, Mr. Lane, you mean that the front end of the engine was headed toward the south and the back end of the engine was to the north?
A. Yes, sir.
Q. Is that what you call backing up, pulling the train?
A. Yes, sir; backing up, pulling the train.

Q. Where were you on the train, Mr. Lane?

A. I was on the back footboard, on the west side.

Q. When you say "on the back footboard, on the west side", where, with reference to the front of the train, would that be?

A. That was on the front, in the direction we were going.

Q. Were there any cars in front of you?

A. No, sir.

Q. Was there any part of the engine itself in front of you?

A. No, sir.

Q. Who were the other members of the crew on that day, Mr. Lane? First, who was the engineer?

A. Mr. Luscomb was the engineer.

Q. And the fireman?

A. Mr. Woodside.

Q. Who was your head man?

A. Mr. Stewart.

Q. Who was the flagman?

A. Mr. Elmore.

Q. Do you know where the different members of the crew were as you approached Bond Avenue?

A. I know where Mr. Stewart was, on the opposite side from me.

Q. On the opposite side of what?

A. On the other footboard, on the east side.

Q. Now, then, Mr. Lane, as you approached Bond Avenue on that day in question, at about what time was it?

[fol. 122] A. Well, around two-fifty.

Q. As the engine approached Bond Avenue what, if anything, did you do?

A. We drove up to Bond Avenue and came to a full stop. I got off the engine and walked out in the middle of the street, and saw two little boys standing there. One was back over on the sidewalk, by the watchman's shanty, and the other was over on or about the main west track. I asked them if they wanted to go across, and they said no. I told them to go on back then, and go home.

Mr. Miller: I object to what he said, unless he identifies this plaintiff as being present at the time.

The Court: Yes, unless he was talking to this plaintiff it is hearsay, as far as plaintiff is concerned.

By Mr. Costello:

Q. Mr. Lane, did you know either of the boys?

A. No, sir; I did not.

Q. Do you know whether one of the boys was the plaintiff, or not?

A. I couldn't say.

Mr. Miller: Then I object to it, if the Court please, and ask that the jury be instructed to disregard the alleged conversation.

The Court: Yes, as to his conversation with certain boys, unless he is able to say with reasonable certainty that one of them was this plaintiff here, it would be hearsay, of course. Objection sustained.

By Mr. Costello:

Q. What, if anything, did the boys do then, Mr. Lane?

Mr. Miller: If the Court please, I object to what any other boys might have done. It is wholly immaterial to this proceeding.

Mr. Costello: I will withdraw the question.

Q. Mr. Lane, what next occurred after you spoke to the boys? Then what happened, what did you do?

A. After they went on back, I gave the engineer a signal to come on back.

Q. What did he do?

A. He had already whistled off those two blasts, and the whistle whistled the road crossing whistle, which was two shorts and two longs, and proceeded on back, and I stood in the middle of the crossing, and got on the footboard, in the same position I was in before.

[fol. 123] Q. While you were standing in the middle of the crossing, Mr. Lane, and from the time that the engine, or the rear end, or front end of the engine, got up to you, did that engine strike anything?

A. No, sir.

Q. After you got on the footboard, were you in a position where you could see anything that was in front of the train?

A. Yes, sir.

Q. After you got on to the step of the engine, did the engine strike anything after that?

A. No, sir; it did not.

Q. As you approached Bond Avenue, Mr. Lane, do you know whether or not there was a bell on the engine?

A. Yes, sir.

Q. Was the bell ringing?

A. It was constantly ringing.

Q. Mr. Lane, as you crossed over Bond Avenue, about how fast were you traveling? how fast was the train traveling?

A. You mean, the full length of the train or——

Q. You were on the front end?

A. Yes, sir.

Q. And as you got over Bond Avenue, the engine itself, how fast was the engine traveling?

A. We couldn't have picked up very fast with the engine. They were not going over two miles an hour with the engine.

Q. Was there any change then in the speed of the train?

A. Oh, I judge by the time we got to Tenth Street, after we made the next stop, we had been—well, four or five miles an hour.

Q. Judging from the length of the train that you had?

A. Yes, sir.

Q. You said fifty cars, did you not?

A. Yes, sir.

Q. And the distance that you went, about how fast would you say that the train was going about the time that the middle of the train passed over Bond Avenue?

A. Well, not over five miles an hour.

Mr. Costello: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. Mr. Lane, you have been with the Southern Railroad how long?

A. Eleven years.

Q. And after you have been with them a considerable length of time you gain what is commonly called seniority, don't you?

A. Yes, sir.

[fol. 124] Q. Now, I believe your recollection is that you passed through there on a train with about fifty cars, along about what time in the afternoon?

A. Around two-fifty.

Q. What was the next time that you came through in the afternoon, with a cut?

A. The next time?

Q. Yes. Did you come through later that afternoon, with another cut?

A. No, sir.

Q. As I understand, you were riding on one footboard?

A. Yes, sir.

Q. Who was on the other footboard?

A. Mr. Stewart.

Q. I will ask you whether or not you know of any rule or limitation upon more than one man riding on a footboard at a time.

Mr. Costello: That is objected to as incompetent, irrelevant and immaterial.

The Court: Oh, yes; it would not affect this case. It is not a ground of negligence, and it would not make any difference whether he violated a rule or not. Objection sustained.

By Mr. Miller:

Q. Whom did you see anywhere around this engine? First I will limit it to the tender: Whom did you see around the tender, besides this other gentleman that was with you?

A. You mean, around the back end of the tender?

Q. Yes, on the tender there. I am speaking of employees of the Company.

A. There was not anyone on the tender, except Stewart and myself.

Q. Did you see anybody else around the engine, riding on any portion of the engine?

A. I could see the engineer.

Q. Did you see anybody else?

A. I couldn't see no one else, no.

Q. In so far as you know, there were only two men rid- on the outside of the engine, or the tender, you and Stewart?

A. Outside? Sure.

Q. Now, you had about fifty cars in that cut?

A. Fifty cars.

Q. Can you tell us, taking into consideration—you are familiar with that grade along where the Southern Railroad track crosses Bond, are you not?

A. I have been down there a great deal.

Q. Can you tell us how long, or in what distance, it would require a train pulling fifty cars, and using an en-
[fol. 125] gine of this character, to get up a speed of, say twelve or fifteen miles an hour, under a load of fifty cars?

Mr. Costello: That is objected to as not cross-examination.

The Court: Objection sustained.

By Mr. Miller:

Q. Where were you at the time you reached this estimate that this cut of cars was going about five miles an hour, when the middle of it was passing over Bond Avenue?

A. Where was I?

Q. Yes, where were you with reference to the Tenth Street crossing?

A. I was on the footboard, the same place that I was when I was at Bond Avenue.

Q. I don't believe you understand. How far were you from the Tenth Street crossing?

A. When the middle of the train was——

Q. At about Bond Avenue?

A. I couldn't say.

Q. When you gave this estimate a moment ago, of five miles an hour, do you know, or had you any point in mind on that line where you were when you stated that the middle of that train was proceeding at about five miles an hour over Bond Avenue?

A. Just judging from the distance, and the time it would take to pick up that much.

Q. How long a distance would be covered by a train of fifty cars?

A. I couldn't say.

Q. Do you know how long an average box car is?

A. They run different lengths.

Q. Well, give us some idea, Mr. Lane.

A. Well, I judge an average, in that many cars, would be around forty.

Q. Forty feet?

A. Forty feet.

Mr. Miller: That is all.

Redirect examination.

By Mr. Costello:

Q. Mr. Lane, I don't believe I asked you if you were familiar with engine 1894 of the Southern Railway Company.

A. Yes, sir.

Q. I will hand you a picture that has been marked "Defendant's Exhibit No. 5"; and ask you to state if you know what that represents.

[fol. 126] A. That represents the front end of 1894.

Q. Is that the same engine that you had on that day?

A. Yes, sir; it is.

Q. Is the representation shown on "Defendant's Exhibit No. 5", a correct representation of engine No. 1894, the front end of it, as it existed on March 3rd, 1927?

A. Yes, sir.

Q. I will hand you this picture, that has been marked "Defendant's Exhibit No. 6", and ask you to state if you know what that is.

A. That is the tender, known as the back end.

Q. Of what engine?

A. 1894.

Q. Does that picture correctly represent the tender end of engine 1894, as it existed on March 3rd, 1927?

A. Yes, sir; it does.

Mr. Costello: I think that is all.

The Court (to the witness): Did you get back on the west step, while the train was moving, or did it stop for you to get on?

A. I got on while it was moving.

The Court: Very well. Is there anything else, gentlemen?

By Mr. Costello:

Q. Is there a cow-catcher on a switch engine?
A. No, sir; there is not.
Q. Was there a cow-catcher on engine No. 1894, on the third day of March, 1927?
A. No, sir; there was not.

Mr. Costello: That is all.

Redirect examination.

By Mr. Miller:

Q. You had a tender, though, on the end of that engine, did you not?
A. A tender? Yes, sir.

Redirect examination.

By Mr. Costello:

Q. There is no cow-catcher on a tender, is there, Mr. Lane?
A. No, sir.

Mr. Costello: That is all.

[fol. 127] HARVEY KNIGHT, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. Speak out loud enough, Mr. Knight, so we can all hear you. You may state your name.
A. Harvey Knight.
Q. Where do you live?
A. 805 North Second Street, Belleville, Illinois.
Q. What is your business?
A. Track supervisor.
Q. For whom?
A. Southern Railway.

Q. How long have you been in the employ of the Southern Railway?

A. Altogether?

Q. Altogether.

A. Twenty four years.

Q. Keep your voice up. This last juror wants to hear you, too.

— Were you working for the Southern Railway Company on the third day of March, 1927?

A. Yes, sir.

Q. Did you have occasion to be in the neighborhood of the Dyke Yards of the Company on that day?

A. Yes, sir.

Q. Did you leave the Dyke Yards?

A. Yes, sir.

Q. How did you leave?

A. On engine 1894.

Q. Do you know who the engineer was on that engine?

A. Luscomb.

Q. Where did you ride, Mr. Knight?

A. On the fireman's side, on the seat block.

Q. Do you know which direction the engine was facing?

A. South.

Q. And that would put the tender, or rear end of the engine, where, with reference to the front of the train?

A. It would be the front of the train.

Q. Are you familiar with engine No. 1894 of the Southern Railway Company?

A. Yes, sir.

Q. I will ask you to state, Mr. Knight, if you know whether, on March 3rd, 1927, or at any time, engine No. 1894 has ever had a cow-catcher, either on the tender or on the front end.

A. No, sir.

Q. Do you remember approaching Bond Avenue while you were in the cab of the engine, Mr. Knight?

A. Yes, sir.

Q. What were you doing up there?

A. Just riding.

Q. Where were you going?

A. Going to Sixth Street.

[fol. 128] Q. In going from the Dyke Yards to Coapman Yards, would the train pass near the Sixth Street Yards of the Company?

A. Yes, sir; it passes within about a block and a half.

Q. Do you remember the movement of the train as it approached Bond Avenue, Mr. Knight?

A. Yes, sir.

Q. I will ask you to state if you know whether or not there was a bell on that engine.

A. Yes, sir.

Q. Do you know whether or not the bell was ringing?

A. Yes, it was ringing.

Q. What kind of a bell was on engine No. 1894?

A. A brass bell.

Q. Do you know whether it was an automatic or a hand ringing bell?

A. Automatic.

Q. Do you know what movement the train made as it approached Bond Avenue, with reference to whether it stopped or not?

A. It stopped at Bond Avenue; yes, sir.

Q. Do you know where the other members of the crew were?

A. I knew where the fireman and the engineer was; and, also, I seen Mr. Lane and Mr. Stewart get onto the footboard, as we was leaving the Dyke Yards.

Q. What happened when the engine stopped at Bond Avenue, if you know?

A. He stopped, and then give a road crossing whistle, and then——

Q. What is that signal?

A. Two long and two short.

Q. Then what happened?

A. Then he gave two whistles.

Q. What signal was that, if it has any significance?

A. It is a signal whistle.

Q. It is a signal whistle?

A. Yes, sir.

Q. Then what happened?

A. He proceeded on over the crossing.

Q. Now, while you were there, going over Bond Avenue, what side of the engine would you be on?

A. The east side.

Q. Did you see anything of any accident, Mr. Knight?

A. No, sir.

Q. When was the first that you heard of any accident?

Mr. Miller: That is objected to, when he heard of it. It is immaterial.

[fol. 129] The Court: I do not think it is immaterial. I think it has some bearing on this case. I am not going to let him say from whom he heard it, or what the words of the communication were, but the verbal fact that he did hear of it, or did not hear of it. He may answer.

By Mr. Costello:

Q. What I want you to answer, Mr. Knight, is, when was the first that you heard of the accident?

A. It was about thirty minutes after I got off the engine.

Q. Where did you hear of it?

A. At the Sixth Street Yard office.

Q. Mr. Knight, I will ask you if you know about how fast the train was going at the time you got off at the Sixth Street place where you did get off.

A. About four or five miles an hour.

Q. Where is Sixth Street, or the place where you got off, with reference to Bond Avenue?

A. It is two blocks north.

Mr. Costello: That is all.

Cross-examination.

By Mr. Miller:

Q. Mr. Knight, how long have you been with the Southern Railway?

A. Twenty-four years.

Q. You have a little seniority there, have you?

A. Yes, I believe so.

Q. You were on the east side of the train, of the engine, were you not?

A. Yes, sir.

Q. From where you were sitting, you couldn't very easily see over on the west side, could you?

A. No, sir.

Q. Now, how is it that you remember so clearly about this stop made at Bond Avenue, when you didn't notice anything of an unusual nature or character there?

A. How is that?

Q. How is it that you remember so clearly about the two short toots, or blasts, of the whistle, and the two long ones, at Bond Avenue, on the third day of March, 1927?

A. Because I was on there; that is the reason I remember it. They always do that.

Q. Is it an unusual thing for you to ride a train?

A. No, sir.

[fol. 130] Q. Was there anything unusual about your crossing over this particular crossing, that caused you to remember about the bell ringing, and about the two short whistles and the two long whistles?

A. Nothing unusual, no.

Mr. Miller: That is all.

Redirect examination.

By Mr. Costello:

Q. Mr. Knight, I will ask you whether or not, shortly after the accident happened, you were questioned about it?

Mr. Miller: I want to object to anything he might have been questioned about after the accident.

Mr. Costello: I am not asking him what the questions were, but the general question as to whether he was questioned.

The Court: He may answer whether he was or not. You asked him why he remembered it, and if there is anything that caused him to remember it, he has a right to state it.

Objection overruled.

To which ruling of the Court the plaintiff, by his counsel then and there, at the time, duly excepted, and still continues to except.

The Witness: Yes, I was questioned.

Mr. Costello: That is all.

Recross examination.

By Mr. Miller:

Q. Usually, in riding with an engineer, or riding in a cab, you are supposed to have a pass, are you not?

Mr. Costello: That is objected to as immaterial.

The Court: It does not make any difference why he was there. He was there, whether he had a pass or whether he did not. That has nothing to do with this case. If he was there, that ends it. Objection sustained.

Mr. Miller: That is all.

Redirect examination.

By Mr. Costello:

Q. Let me ask you one question, will you, please, Mr. Knight? Do you know what the grade of the track is, particularly the eastbound main track, from the Dyke Yard up to Tenth Street?

[fol. 131] A. From the Dyke Yard up to Tenth Street?

Q. Yes, the approximate grade?

A. There is about one per cent drop.

Q. There is about one per cent drop?

A. Yes, sir.

Q. Is that on your division, that you have supervision of, as track supervisor?

A. Yes, sir.

Mr. Costello: That is all.

The Court (to the witness): I want to get that. To one as familiar as you are with the Dyke Yard and the Coapman Yards, it is perfectly plain, of course, but this is the point: As you were on the train that day, as the train was moving, were you going upgrade or downgrade?

A. We were going downgrade.

Q. And what per cent was that grade?

A. One per cent.

Q. One per cent?

A. Right about one per cent.

Q. That is one foot in a hundred feet?

A. Yes, sir.

The Court: Very well.

Mr. Costello: That is all, Mr. Knight.

JOHN LUSCOMB, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant, as follows:

Direct examination.

By Mr. Costello:

Q. You may state your name.
A. John Luscomb.
Q. Where do you live?
A. 423 North Fourteenth Street, East St. Louis.
Q. What is your business or occupation?
A. Locomotive engineer.
Q. For whom?
A. Southern Railway.
Q. How long have you worked for the Southern Railway?
A. Thirty-seven years, past.
Q. How long have you been an engineer?
A. Twenty-nine years.
Q. Were you working for that Company on the third day of March, 1927?
A. Yes, sir.
Q. Running an engine?
A. Yes, sir.
Q. What engine?
A. 1894.
[fol. 132] Q. How long had you been familiar with engine No. 1894, Mr. Luscomb?
A. Sir?
Q. How long had you been familiar with engine No. 1894?
A. Oh, about three or four years.
Q. Was there any cow-catcher, either on the front of the engine or the tender end of the engine, at any time while you knew it?
A. No, sir.
Q. Is there any cow-catcher on a switch engine?
A. No, sir.
Q. Do you remember the movement of a train of cars, that you made with engine 1894, in the Dyke Yards, on the third day of March, 1927?
A. Yes, sir; we had fifty cars in the train.
Q. Were they loaded or empty?
A. Well, I suppose they were mixed.
Q. Now, then, do you know who the members of the crew were on the train?
A. Yes, sir.

Q. Who was the fireman?
A. Mr. Woodside.
Q. Who was the engine foreman?
A. George Lane.
Q. Who was the head man?
A. John Stewart.
Q. Who was the brakeman?
A. Charlie Elmore.
Q. As you left the Dyke Yards, do you know where Mr. Lane was?
A. He was on the back footboard, back end of the tank, going north.
Q. How was the engine headed as you went north?
A. Well, the engine was headed south.
Q. That would put the tank or tender end in the front, would it?
A. Yes, sir.
Q. Where was Lane, with reference to the front of the train?
A. He was on the very head end of the tank, on the footboard.
Q. Whom did you receive signals from about the movement of that train, Mr. Luscomb?
A. Mr. Lane.
Q. Do you remember approaching Bond Avenue on the day in question?
A. Yes, sir.
Q. As you approached Bond Avenue, I will ask you, Mr. Luscomb, if you know whether or not that engine was equipped with a bell; did it have a bell on it?
A. Yes, sir.
Q. How was the bell operated?
A. By air.
Q. Is that what is known as an automatic air ringer?
A. That is what is known as an automatic air ringer.
Q. Who operates the air?
A. I do.
Q. How does it operate?
A. By air.
[fol. 133] Q. I know, but what do you do to start it in motion?
A. Turn on the air, through the valve.
Q. And until you turn off the air in the valve, what will the bell do?

A. It will ring.

Q. As you approached Bond Avenue was the bell ringing all the time?

A. Yes, sir.

Q. What did you do with reference to stopping at Bond Avenue?

A. I stopped the train, and then I whistled two blasts of the whistle.

Q. Then what happened?

A. Mr. Lane went out and walked down the line, to flag the crossing, and there was two little boys standing there, and he said something to them, and chased them over toward the tower and he came back and gave me the signal to come on. I blowed two road crossing whistles, and proceeded north.

Q. Were you in a position, Mr. Luscomb, where you could see on the west side of the track, there?

A. The west side? Yes, sir.

Q. The engineer's side of the engine is which side?

A. Well, depending——

Q. Tell which side it is. We will get it that way.

A. The right side.

Q. The right side?

A. Yes, sir.

Q. But when your engine is backing up, and in the direction in which you were going, on which side of the engine were you?

A. I was on the left side.

Q. Which side would you be on, on the engine, with reference to whether you were on the east side or the west side, as you went north?

A. As we went north?

Q. Yes.

A. I would be on the left side.

Q. With reference to whether it would be east or west, which side it would be?

A. East or west?

Q. Yes; which side, the east side or the west side, would you be on?

A. I would be on the west side.

Q. Now, as your engine pulled over Bond Avenue, could you see up toward the front of the engine?

A. As I pulled by I could see. I didn't look back to see back there.

Q. No, but the front—were you looking toward the front?

A. I was looking toward the front.

Q. Did you see the engine strike anything?

A. No, sir.

Q. And as you pulled over Bond Avenue did the engine strike anything?

A. No, sir.

[fol. 134] Q. When was the first you heard of anybody having been injured by the train, Mr. Luscomb?

A. The next morning, when I came to work.

Q. I do not know whether I asked you or not, but who was in the cab of the engine besides yourself?

A. The supervisor, Mr. Knight.

Q. And who else?

A. That is all; Mr. Woodside, the fireman.

Q. Was your train equipped with air?

A. Yes, sir.

Q. How was the train connected?

A. All coupled up with air hose.

Q. Do you know about how fast you were going, Mr. Luscomb, as you pulled over Bond Avenue?

A. Well, around about two miles an hour.

Q. What did you do with reference to your speed, as to whether you increased it or diminished it?

A. It increased my speed to around about six miles per hour; five or six miles per hour.

Q. At the time that you gave the signals, as you call it, before you started to cross Bond Avenue, where was Mr. Lane?

A. Right about the middle of the track.

Q. Where, with reference to Bond Avenue?

A. Sir?

Q. Where, with reference to Bond Avenue?

A. Bond Avenue?

Q. Where was Lane with reference to Bond Avenue, the crossing there over the tracks?

A. Crossing? He had been on the back footboard.

Q. No, I mean at the time he gave you the signal to come on. Where was he then?

A. Standing between the track there.

Q. Where, on Bond Avenue, was he? Was he on Bond Avenue, or across Bond Avenue?

A. He was out in the middle of the street.

Q. What did you do when you started up?

A. I blowed the crossing whistle.

Q. What did Lane do when you got up to him?

A. He jumped on the back footboard.

Q. Mr. Luscomb, I will ask you to look at the pictures that were marked "Defendant's Exhibits Nos. 5 and 6", and particularly at No. 5, that I hand you, first, and ask you to state what that is.

A. That is 1894 engine, the front end of the engine.

Q. Does that correctly represent the condition of the front end of 1894, as it existed on March 3rd, 1927?

A. Yes, sir.

Q. I will show you "Defendant's Exhibit No. 6": What is that?

A. That is the tank.

Q. Of what?

A. Of engine 1894.

[fol. 135] Q. Does that correctly represent the condition of the tank end of 1894, as it existed on March 3rd, 1927?

A. Yes, sir.

Q. You spoke about Lane being on the footboard in front of the tank. Does that appear there?

A. There it is, right there (indicating on the exhibit).

Mr. Costello: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. Mr. Luscomb, as I understand you, on the engine and tender you had virtually all of your crew, did you not?

A. All of our crew?

Q. Yes.

A. Two of them.

Q. You had Mr. Lane and Mr. Stewart?

A. Stewart.

Q. And there was Mr. Knight, the superintendent, riding in the cab?

A. The supervisor was riding in the cab, yes, sir.

Q. What was the fireman's name?

A. Woodside.

Q. Mr. Woodside?

A. Yes, sir.

Q. And yourself, that makes five riding on either the engine or on the tender, does it not?

A. Yes, sir.

Q. You had one more man in that crew, did you not?

A. Yes, sir.

Q. Was he riding on the last car?

A. I couldn't state whether he was on the last car. He was on the rear end.

Q. From your experience in railroading, could you tell us whether that means that last car, or about the last car, when you say "the rear end"?

A. Well, it is as near the last car, the rear end of the train.

Q. As I understand, you had about fifty cars in that cut, isn't that true?

A. Yes, sir.

Q. Do you recall whether or not you made your stop up at the Tenth Street crossing?

A. Yes, sir.

Q. You made a stop up there?

A. Yes, sir.

Q. Do you know how far it is from Bond Avenue up to the Tenth Street crossing?

A. Well, I judge it is about forty car lengths.

Q. It is about forty car lengths? And in this cut you had about fifty cars, did you not?

A. Yes, sir.

Q. Then when you made a stop at the Tenth Street crossing, the next one up——

Mr. Costello: That is objected to as immaterial.

[fol. 136] Mr. Miller: I think I am entitled to inquire about that.

Mr. Costello: It is not cross examination. I did not ask him about a stop at Tenth Street.

The Court: You are asking him now about a situation that came into existence after the accident. I do not see the relevancy of it.

By Mr. Miller:

Q. Now, then, as I understand you, you had all of your men, except one, riding up on that engine or tender?

A. Yes, sir.

Q. Do you know what is the approximate length of fifty box cars, of the kind that you were hauling on this particular day?

A. No, sir.

Q. Well, I will ask you if, from your thirty-seven years' experience you can tell us whether or not the average box car is at least forty feet long?

A. They run between forty and sixty.

Q. Well, if you multiply forty by fifty, you get two thousand, do you not?

Mr. Costello: I object to that, your Honor; turning it into a problem in arithmetic.

The Court: He may answer. I cannot see any reason for expert evidence.

Mr. Miller: I think I can connect it up, your Honor.

The Court: It is not necessary to connect it up. The Court can figure a little bit, and the jury probably can figure a good deal more. So, together, we can figure it, if we get the distance and the number of cars, without getting brain fag.

By Mr. Miller:

Q. Now, then, there was no man on this cut of cars, between your engine and the rear end, was there?

A. Not to my knowledge.

Q. Isn't it a fact, Mr. Luscomb, that you oftentimes hook onto a car and pull them in a backward fashion, or back up, in order to give the engineer a clear view of what is going on down the line?

Mr. Costello: I object to that. That is an argument.

The Witness: No, we don't.

The Court: There is nothing of that sort here. You have not charged any negligence because he did not do that, and it does not help us in any way, that I can see.

[fol. 137] By Mr. Miller:

Q. I will ask you this, Mr. Luscomb: Under these circumstances, the way that your crew was apportioned on that particular day, was that the regular position for them all to be in?

Mr. Costello: I object to that, your Honor. That is immaterial, irrelevant and incompetent. Also, there is no

charge of negligence because of having the crew stationed at different places.

The Court: You do not charge——

Mr. Miller: It might affect their credibility.

The Court: He may answer and I will see whether there is any relevancy. I do not see any.

A. The men were in their proper places.

By Mr. Miller:

Q. That is, five on one end and one on the other?

A. That is the proper place; the men was in their proper positions.

The Court (to Mr. Miller): There were not five there. You have misconstrued the evidence. Mr. Knight was merely a passenger, who was suffered to ride there, because it was easier to ride than it was to walk, and he was required to go, in order to attend to his duties, from the Dyke Yard up to the Sixth Street Yards? He was not a part of the crew; he was a passenger. So, the question is misleading, a little.

Mr. Miller: If that was the customary and regular position for these men to assume, Mr. Luscomb, in the event anything had occurred between the middle and the rear end of this cut of cars, or train, you were hauling, it would be impossible to communicate a signal to you, would it not?

Mr. Costello: We object to that.

The Court (to Mr. Miller): You have not stated any fact of negligence bottomed upon a suggestion, even, that the members of this crew were not where they ought to be. This witness has told you that they were where they ought to be. So, you neither have evidence in the record, nor have you any pleading, to bottom any omission whatever upon a wrong positioning of these men. Therefore, it ought not to get into the record. It does not help us.

[fol. 138] To which ruling of the Court the plaintiff, by his counsel, then and there, duly objected and excepted, and still continues to object and except.

By Mr. Miller:

Q. You have been with the Company thirty-seven years?

A. Yes, sir.

Q. You are still with the Company?

A. Yes, sir.
Q. You have thirty-seven years seniority?
A. Yes, sir.

Mr. Miller: That is all.
Mr. Costello: That is all, Mr. Luscomb.

JOHN R. STEWART, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. Please state your name.
A. John R. Stewart.
Q. Talk out loud now, Mr. Stewart. Where do you live, please, sir?
A. 3137 Trendley, East St. Louis.
Q. By whom are you employed?
A. Southern Railway.
Q. How long have you been so employed?
A. Since the fourth of November, in 1925.
Q. 1925?
A. Yes, sir.
Q. Were you working for the Company on March 3rd, 1927?
A. I was.
Q. In what capacity?
A. Switchman.
Q. Are you still working for the Company?
A. Yes, sir.
Q. Mr. Stewart, I will ask you whether or not you were a member of the crew that was in charge of train No. 1894, or engine No. 1894, on the third day of March, 1927.
A. Yes, sir.
Q. Who was the engine foreman?
A. Lane.
Q. Who was the engineer?
A. Luscomb.
Q. Who was the fireman?
A. Woodside.

Q. Who was the rear man, or brakeman?

A. Elmore.

Q. Mr. Stewart, do you remember approaching Bond Avenue on the day in question?

A. Yes, sir.

Q. Where were you on the train?

A. I was on the head end of the train.

[fol. 139] Q. What was the head end of the train; what was in front?

A. It was the tank of the engine.

Q. The engine was backing up, pulling the cars?

A. Yes, sir.

Q. Do you know how many cars you had in the train?

A. No, I don't.

Q. Do you remember the train approaching Bond Avenue?

A. Yes, sir.

Q. I will ask you, Mr. Stewart, if you know whether or not the train made a stop for Bond Avenue?

A. It did.

Q. Mr. Stewart, do you know whether or not the engine was equipped with a bell?

A. It was.

Q. Was the bell ringing as you approached Bond Avenue?

A. It was.

Q. Was there any whistle on the engine, do you know?

A. There was.

Q. Did you hear any blasts from the whistle either while you were at Bond Avenue, or before you got there?

A. Before we left there.

Q. Where was Mr. Lane, if you know?

A. Mr. Lane was on the footboard of the engine, at the extreme front end of the train.

Q. Where was he with reference to where you were?

A. He was on the west side of the drawbar, from me.

Q. He was on the west footboard and you were on the east footboard?

A. On the east footboard.

Q. When you stopped at Bond Avenue what did Mr. Lane do, if anything?

A. Mr. Lane walked to the center of Bond Avenue, and there were two little fellows there, and he chased them

away, and he gave the usual signals. There was no more traffic there, and the engineer whistled a road crossing signal.

Q. What is that?

A. Two long and two short blasts; also two short blasts of the whistle to start the train, and proceeded. Lane got on the footboard as it came to him over the crossing.

Q. Between the time that the engine started from where it had been stopped at Bond Avenue, and the time when it got up to where Lane was, in the middle of Bond Avenue, could you see in front of the train all the time?

A. Yes, sir.

Q. Did the train hit anything during that time?

A. No.

Q. And after Lane got on to the footboard, on his side of the engine, and you crossed over Bond Avenue, could you still see the front of the train?

A. Yes, sir.

[fol. 140] Q. Did it hit anything during that time?

A. No.

Q. What speed, if you know, Mr. Stewart was the train traveling at, or the engine of the train, as you crossed over Bond Avenue?

A. Well, about two miles an hour.

Q. What happened with reference to the speed as you went along after you started?

A. It increased a little.

Q. And about how fast were you going after you got started?

A. Well, when we got around about where we crossed Eighth Street, about six miles an hour.

Q. When did you first hear of any accident having happened, Mr. Stewart?

A. The next evening, about three-thirty.

Q. Did you witness anything of an accident that happened there on Bond Avenue?

A. No.

Q. Was there any air on this train?

A. Yes, sir.

Q. How was it coupled?

A. By air hose, and inspected by a car inspector.

Mr. Costello: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. You remember these four blasts of the whistle very distinctly, too?

A. Yes, sir.

Q. Do you recall anything that happened at that time, at that crossing you speak about, that impresses these four blasts upon your memory?

A. Why, I made a statement the next day, and I remembered it very distinctly.

Q. Well, was that an unusual thing, to make four blasts at that crossing?

A. No.

Q. In other words, you make the same blasts at each crossing, don't you?

A. Yes, sir.

Q. Every time you cross over a street?

A. Yes, sir.

Q. But you do remember this particular crossing above all other crossings?

A. Yes, sir.

Q. And you remember the exact number of blasts?

A. Yes, sir.

Q. Even though there was nothing unusual or extraordinary that attracted your attention there?

A. To the fact that it was called to my attention the next day, and I remember it very distinctly.

Q. Do you remember the stop made up at Tenth Street?

[fol. 141] A. Yes, sir.

Q. How many years have you been with the Company?

A. Four years, the fourth day of this month.

Q. To the best of your knowledge, did you have as many as fifty cars in that cut?

A. I don't know how many cars were in the cut.

Q. Do you always ride the footboard, in a switching movement?

A. When it requires me to be there.

Q. Where was the middleman, the hind man, in this train?

Mr. Costello: I object to the term "middleman", your Honor. There is no evidence that there was a middleman.

The Court: Yes; there was no evidence that there was a middleman, or that any rule required a middleman, and

you have not pleaded the lack of a middleman. So, you can not go into it.

Mr. Miller: That is all, Mr. Stewart.

Mr. Costello: That is all, Mr. Stewart.

JOHN LUSCOMB, recalled, testified in further cross-examination as follows:

Further cross-examination.

By Mr. Miller:

Q. Mr. Luscomb, how long had you operated this particular type of engine on March 3rd, 1927?

A. This particular type of engine?

Q. Yes.

A. About two years—three years.

Q. Had you passed over that grade along Bond Avenue, on numerous occasions?

A. Numerous occasions?

Q. On numerous occasions, numerous times?

A. Sure, I did; yes, sir.

Q. Have you hauled as many as forty-five or fifty cars, numerous times?

Mr. Costello: I object to that, your Honor. That is not cross-examination.

Mr. Miller: I must lay the foundation for the question I want to ask him. I want to qualify him on the matter of speed.

The Court: He may answer. Objection overruled.

[fol. 142] By Mr. Miller:

Q. Have you, on a number of occasions, hauled as many as forty or fifty cars?

A. Yes, sir.

Q. Now, taking into consideration the type of engine that you were using on March 3rd, 1927, taking into consideration a haul or string or drag of some forty-five or fifty cars, and whatever grade, if any, there is, and going northwardly across Bond Avenue, can you tell us what distance it would require to get up a speed of twelve to fifteen miles an hour?

A. We never run twelve or fifteen miles an hour.

Q. Well, can you tell us how long it would take you to get up to a speed of ten miles an hour?

A. We never run over between six, five or six miles an hour down through there.

Q. Well, in what distance would it take you to get up a speed of six miles an hour, under those conditions?

A. Well, I don't exactly know.

Q. You have operated trains for some thirty-seven years, have you not?

A. Yes, sir.

The Court (to Mr. Miller): He said twenty-nine years.

By Mr. Miller:

Q. Have you not, during that period of time, been able to form any approximate estimate of what distance it would take you, under those conditions just given? Just give us your best judgment; you do not have to be exact.

A. Well, maybe three to five minutes.

Q. That is, to get up to six miles an hour?

A. Yes, sir.

Mr. Miller: Thank you, sir.

Mr. Costello: That is all, Mr. Luscomb.

W. W. Woodside, a witness of lawful age, being duly produced, sworn and examined on the part of the defendant, testified as follows:

Direct examination.

By Mr. Costello:

Q. Talk out loud now, so the last man can hear you. State your name.

A. W. W. Woodside.

Q. Where do you live?

A. 3634 Bond Avenue.

Q. What city?

A. East St. Louis.

Q. By whom are you employed?

[fol. 143] A. Southern Railway.

Q. How long have you worked for them?

A. About over nineteen years.
Q. Are you still working for them?
A. Yes, sir.
Q. Were you working for them on the third of March, 1927?
A. Yes, sir.
Q. In what capacity?
A. Locomotive fireman.
Q. On what engine?
A. No. 1894.
Q. Who was your engineer?
A. Mr. Luscomb.
Q. Do you know who was in charge of the crew, the engine——
A. Yes, sir.
Q. Who?
A. Mr. Lane.
Q. Do you remember the engine and string of cars leaving Dyke Yard and going to Coapman Yard?
A. Yes, sir.
Q. How was the engine headed?
A. The engine was headed south.
Q. Where was the tender of the engine?
A. The tender was towards the north.
Q. And the front of the train was the tender, was it?
A. Yes, sir.
Q. Do you know where Mr. Lane was at the time you left the Dyke Yards?
A. When they left the Dyke Yards he was on the back footboard of the tender.
Q. Do you remember approaching Bond Avenue on that day?
A. Yes, sir.
Q. Do you know, Mr. Woodside, whether or not there was a bell on that engine?
A. Yes, sir.
Q. What kind of a bell was it?
A. Why, it was a brass bell; standard locomotive bell.
Q. How was it equipped, with reference to ringing?
A. Well, with a bell, ordinary cord, and the——
Q. How was it being operated on that day?
A. By a bell ringer.
Q. Who operates the bell ringer?

A. The engineer.

Q. With what is it operated?

A. The air.

Q. Was the bell ringing as you approached Bond Avenue?

A. Yes, sir.

Q. You may state, if you know, whether or not the train stopped at Bond Avenue.

A. Yes, it did.

Q. What, if anything, happened, if you know?

A. Nothing happened that I know of.

Q. Which side of the engine were you on?

A. I was on the east side of the engine; on the left side of the engine, on the east side, backing up.

[fol. 144] Q. From where you were on the engine, could you see on the west side?

A. Not only just a short space, through the gangway, would be all.

Q. Could you see out in front, on the west side?

A. No, sir.

Q. Out towards the front?

A. Not standing up.

Q. When was the first that you heard of any accident having happened, Mr. Woodside?

A. That evening, on my way home.

Q. Who, if you know, was in the cab with you, except the engineer?

A. Mr. Knight, the superintendent.

Q. Superintendent, or supervisor?

A. Supervisor.

Q. Do you know the approximate speed that you were traveling as the engine crossed over Bond Avenue after you were started?

A. Well, he started out at the rate of about one to two miles, over Bond.

Q. Then what happened to the speed

A. Sir?

Q. What happened to the speed of it, anything?

A. Why, it increased after the engine got over Bond; it increased up around toward Tenth Street.

Q. As you got up around the Sixth or Eighth Street Yards, about how fast were you going, if you know?

A. Between three, four and five miles an hour.

Q. The train was equipped with air, or do you know?

A. Yes, sir.

Q. Mr. Woodside, how long have you been familiar with engine No. 1894?

A. Why, seven or eight [year-], I think; as long as they have had them there.

Q. I will ask you to look at a picture that has been marked "Defendant's Exhibit No. 5", and state what that is.

A. That is the head end of 1894 engine.

Q. Does that represent the condition of the engine as it was on March 3rd, 1927?

A. Yes, sir.

Q. I will hand you a picture which has been marked "Defendant's Exhibit No. 6", and ask you to state what that is.

A. That is the rear end of the tender of 1894.

Q. Does that represent the condition of the rear end of the tender of 1894, as it existed on March 3rd, 1927?

A. Yes, sir; it does.

Mr. Costello: You may inquire, Mr. Miller.

[fol. 145] Cross-examination.

By Mr. Miller:

Q. Mr. Woodside, as I understand, you were over on the fireman's side, on the west side of this train—on the east side of this train?

A. Yes, sir.

Q. You could not see much from where you were, could you?

A. No.

Q. You did not notice anything as you came up to the crossing there, did you?

A. Not when we came up to the crossing.

Q. In fact, there was nothing about your approaching that crossing that caused you to take any note of it at all, was there?

A. No, sir; I didn't see nothing.

Q. You do not remember about those two short and two long whistle blasts, do you?

A. Yes, sir.

Q. Do you remember those?

A. Yes, sir.

Q. You, of course, never talked to anybody about this case?

Mr. Costello: I object to that, your Honor.

The Court: He may answer. Objection overruled.

Mr. Costello: It was the form of it that I objected to.

By Mr. Miller:

Q. You have not discussed this case with any one, have you?

A. No, sir.

Q. You have not talked to a soul about it?

A. The crew.

Q. That is all, just the crew?

A. What happened, that was all.

Q. You just discussed it with the crew, did you not?

A. Yes, sir.

Q. Nobody else?

A. No.

That is all.

Redirect examination.

By Mr. Costello:

Q. You made a statement to the Claim Agent, did you not, Mr. Woodside?

A. I am acquainted with him.

Q. I say, did you make a statement to the Claim Agent of the Company?

A. Yes, sir.

Q. About what you knew about the accident?

[fol. 146] A. Yes, sir; he inquired.

Mr. Costello: That is all.

CHARLES G. ELMORE, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. Speak out loud, now. State your name.

A. Charles G. Elmore.

Q. Can you do a little better than that? Where do you live?

A. 753 North 53rd Street, East St. Louis.

Q. For whom do you work?

A. Southern Railroad Company.

Q. In what capacity?

A. Switchman.

Q. How long have you worked for the Southern Railway Company?

A. About ten years.

Q. Are you still employed by that Company?

A. Yes, sir.

Q. Were you working for that Company on March 3rd, 1927?

A. Yes, sir.

Q. The crew that you were working with, what engine did you have?

A. 1894.

Q. Who was the engineer?

A. Mr. Luscomb.

Q. Now, then, do you remember the movement of a train of cars from the Dyke Yards to the Coapman Yards?

A. Yes, sir.

Q. When you left the Dyke Yards where were you, Mr. Elmore?

A. On the rear car; on the north end.

Q. What kind of a car was that?

A. A coal car.

Q. Where did you stay as your train proceeded on up to the Coapman Yards?

A. On the north end of the car.

Q. Do you remember when the rear end of the car passed over Bond Avenue, Mr. Elmore?

A. Yes, sir.

Q. Did you notice anything unusual in the movement of the train on that day?

A. No, sir.

Q. When was the first that you heard of any accident having happened at Bond Avenue?

A. When we pulled in to the Coapman Yards, the west end.

Mr. Costello: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. As I understand you, you were on the hind end?
[fol. 147] A. Yes, sir.
Q. You were the last man on the last car?
A. Yes, sir.
Q. Now, where was the next closer railroad employe to you, that is, in connection with this train?
A. Well, I couldn't say.
Q. How far were you, about, from the engine?
A. Fifty cars.
Q. Would you say that is about four-tenths of a mile?
A. Yes, about.

Mr. Costello (to the witness): Keep your voice up; we can not hear you.

By Mr. Miller:

Q. Do you remember the stop that you made at Bond Avenue?
A. Yes, sir; I remember the train coming to a stop.
Q. Do you remember the train coming to a stop at Bond Avenue?

Mr. Costello: He said he remembered the train coming to a stop. He didn't say it was at Bond Avenue.

By Mr. Miller:

Q. Do you remember of the train coming to a stop on Bond Avenue?
A. I remember coming to a stop, but not—I couldn't say at any certain place.
Q. About where was your car, the car upon which you were riding, at the time you noticed this alleged stop?
A. Well, it was fifty cars from the engine.
Q. You were fifty cars from the engine, but can you tell us where, with reference to, say Trendly Avenue?
A. Well, that was nearer to the second I. C. crossing.
Q. How many blocks is that south of Bond Avenue?
A. Well, I don't know.
Q. You have traveled over that a number of times, have you not?

A. There is quite a space in there, that is not,—that is no city block.

Q. Give us some estimate, in hundred feet, or thousand feet, or whatever it may be, if you can.

A. Well, something like two thousand feet, I imagine.

Q. Do you remember another stop made after that, and before your car got to Bond Avenue?

A. Yes, sir.

Q. Do you know what stop that was they were making? [fol. 148] A. No, I couldn't say.

Q. I will ask you, in order to refresh your memory, if the next stop following Bond Avenue is not Tenth Street.

A. Yes, sir.

Q. Now, does that come back to you, is that clear now?

A. Yes, sir.

Q. At the time they made that second stop, or what has been referred to as Tenth Street, your car had not gotten to Bond Avenue, had it?

A. No, sir.

Q. You are still with the company, are you not?

A. Yes, sir.

Mr. Miller: That is all, Mr. Elmore.

Mr. Costello: That is all, Mr. Elmore.

G. W. Lane, recalled, testified in behalf of defendant as follows:

Direct examination.

By Mr. Costello:

Q. I forgot to ask you, when was the first that you heard of an accident having happened at Bond Avenue?

A. After we had cut off and got our engine back to the west end, where we quit work.

The Court (to the witness): How many hours, if it was an hour, after the accident until you heard of it?

A. I judge it was about three-fourths of an hour.

Q. You judge it to be about three-quarters of an hour until you heard of it?

A. Yes, sir.

The Court: Very well.

Mr. Costello: That is all, Mr. Lane.

Mrs. Ruth Ericson, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. Speak out loud, Mrs. Ericson. You may state your name.

A. Ruth Ericson.

Q. Where do you live, Mrs. Ericson?

A. 611 Bond Avenue, East St. Louis, Illinois.

Q. How long have you lived there?

[fol. 149] A. Since 1924.

Q. Were you living in the neighborhood of Sixth and Bond Avenue, on the third day of March, 1927?

A. We lived at 311a South Eighth Street.

Q. Where is that, with reference to Eighth and Bond Avenue?

A. Well, it is not quite a block off Bond Avenue.

Q. Did you have occasion to be on Bond Avenue, on the third day of March, 1927?

A. Yes, sir.

Q. Where were you, Mrs. Ericson, particularly at the time when the train was coming along there?

A. When I noticed it, I was—I had just left 603 Bond Avenue, going east on Bond towards Eighth Street.

Q. Do you know where the tracks cross over Bond Avenue?

A. Yes, sir.

Q. As you went up to the track what did you see, Mrs. Ericson?

A. I first noticed the train.

Q. What was it doing?

A. Moving slowly.

Q. Where?

A. Going north across Bond Avenue.

Q. Then what did you see, Mrs. Ericson?

A. Well, I don't know; I don't remember—just noticing the cars now and then, and then when I got near the tracks, I noticed an object. I thought at first it was some child, maybe had just fallen down on the tracks, you know. And

I walked on again, and then I looked again, and I saw that whatever it was, was trying to get up, and that I suspicioned there was somebody hurt there, and I ran over across to the track, and when I got there it was a boy down.

Q. When you first saw the train had the engine crossed over Bond Avenue?

A. I didn't see any engine.

Q. Well, did you see the front of the train?

A. I saw some cars.

Q. All you saw was some cars?

A. Yes, sir.

Q. You don't know how many cars had gone by before you saw the boy?

A. No, sir.

Q. Do you know, or did you hear anybody scream there that day?

A. No, sir.

Q. Do you remember whether you screamed or not?

A. If I did I don't remember it.

Q. If you did scream, was it at the time you got to the boy?

Mr. Miller: I submit, there is no hypothesis upon which to base that question at all.

The Court: I think not. She says that if she screamed, she does not remember it.

[fol. 150] By Mr. Costello:

Q. Did you see any other boy there, Mrs. Ericson?

A. When I got almost to the track a boy passed me, running.

Q. Did you know that boy?

A. No, sir.

Mr. Costello: That is all, Mrs. Ericson.

Cross-examination.

By Mr. Miller:

Q. Where was your home at that time, how far west of this crossing?

A. It was south of the crossing.

Q. What street did you live on?

A. Eighth Street. It would be southwest.

Q. I beg your pardon, I did not get what street you said.

A. Eighth Street.

Q. And did you live south of Bond Avenue, on Eighth Street?

A. No, sir; north.

Q. Where had you been?

A. I had been to our barber shop, at 603 Bond.

Q. How far is that west of these railroad tracks?

A. Well, it is not quite two blocks.

Q. As I understand, when you first stepped out of there you saw some cars going across the crossing up there?

A. Yes, sir.

Q. Were you then about two blocks——

A. Well, hardly two blocks.

Q. Did you see the engine at that time?

A. No, sir.

Q. So, all you saw at that time, Mrs. Ericson, was the cars passing there. Then when you got there, you were able to distinguish some moving object there in the street?

A. Yes, sir.

Q. On the surface of the street, is that correct?

A. Yes, sir.

Q. You did not see the boy get hit, did you?

A. No, sir.

Q. Now, I will show you a paper here, which I will ask to have marked Plaintiff's Exhibit HH'': I will ask you to look at the signature on that, and state whether that is your signature, Madam.

A. Yes, sir.

Q. Did you sign that?

A. Yes, sir.

Q. I will ask you if you remember, on the twenty-seventh day of April, 1927, a man coming to your home and interviewing you about this case.

A. I don't remember the date.

Q. Some man talked to you about it?

[fol. 151] A. There has been several, but I don't remember the dates of them.

Q. Did you give a statement to the gentleman who came there?

Mr. Costello: That is objected to, your Honor, unless he identifies the gentleman. She says there have been several of them there.

Mr. Miller: Question withdrawn.

Q. I will ask you to look this paper over, and see if you can tell me what that is, and if you remember when you signed it, under what circumstances.

A. (After examining paper.) That is what I saw.

Q. That is exactly what you saw, isn't it?

A. To the best of my knowledge, it is.

Q. Just what is written on this paper. So, that reflected your idea at that time of what you saw, and it reflects your idea at this time?

A. It is the same thing.

Mr. Miller: I desire to offer in evidence what has been marked as Plaintiff's Exhibit H."

The Court: You had better wait until you come to the rebuttal, and not get us too confused here with our record.

Mr. Miller: Just one question further, Mrs. Ericson. Do you expect to be compensated for your time spent over here?

A. I expect to get witness fees.

Q. Do you expect to receive any compensation in addition to the witness fees?

A. No, sir.

Q. Have you already, up to this time, received any compensation, other than witness fees?

A. Just the witness fees.

Q. That is all, is it?

A. Yes, sir.

Q. You are sure about that?

A. Yes. That is all I expected.

Mr. Miller: That is all.

Mr. Costello: That is all.

The Court (to the witness): Let me ask you a question: Were you the first person who got to this boy?

A. Yes, sir.

Q. Did you remain where he was until other persons came?

A. I moved him back away from the track.

[fol. 152] Q. You moved him, yourself?

A. Yes, sir.
Q. Do you know Mrs. Pettit or Mrs. Odell?
A. No, sir.
Q. Did any other two women come there?
A. There was a whole bunch around the train, around the boy.
Q. But you were the first one that got to him?
A. Yes, sir.
Q. Did you see a man come through the cars?
A. Yes, sir.
Q. He came after you got there?
A. Afterwards.
Q. You were two hundred feet away, or two blocks, when you first say the train?
A. Not quite two blocks.
Q. How far?
A. Well, I suppose really it was only a good block and a half.

The Court: Very well.
Mr. Costello: That is all.
The Court: Have you any other questions?
Mr. Costello: No, that is all, your Honor.

HENRY RIEKEN, a witness of lawful age, being first duly produced, sworn and examined, testified on behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. You may state your name.
A. Henry Rieken.
Q. Where do you live?
A. 817 Pennsylvania, East St. Louis.
Q. What is your business or occupation?
A. Roofing.
Q. Did you ever work for the Southern Railroad Company?
A. No, sir.
Q. Do you work for the Southern Railway Company now?

A. No, sir.

Q. On March 3rd, 1927, did you have occasion to be in the neighborhood of Eighth Street and Bond Avenue?

A. Yes, sir.

Q. Do you remember the occasion of seeing an accident there?

A. Yes, sir.

Q. Which direction were you going just before you got to Bond Avenue?

A. I was tramping, walking south on Eighth Street.

[fol. 153] Q. Toward Bond Avenue?

A. Toward Bond Avenue.

Q. When you got to Bond Avenue what, if anything, did you see, Mr. Rieken?

A. Why, there was a train of cars going north, and there was an automobile parked there, stopped there waiting for the train to pass.

Q. Go right ahead.

A. And I was collecting insurance at the time. Everything was quiet then, and I looked down at my book, to see where I was going to make my next stop. In the meantime, someone screamed. I looked; after I looked I saw a lady, and I looked where she was pointing, and yelling, and she was all excited, and I saw the boy under the cars on the track.

Q. When you first saw the train did you see the engine?

A. No, sir.

Q. Do you know how many of the cars had gone across Bond Avenue, if any, when you first got up there?

A. When I first saw the train, I was walking south on Eighth Street, and by looking through between times, naturally, I saw the cars passing north.

Q. When you got up to Bond Avenue, then, have you any idea how many had gone by?

A. I don't know how many had gone by. I couldn't see the engine; I couldn't see the far end of the train, but I looked south. I didn't know whether to try to climb through, or to run around the train, so I looked south, and saw there was possibly four or five cars to the end, and I started running around the train.

Q. Where was the lady that screamed, if you know?

A. In the automobile.

Q. Were there any ladies outside of the automobile?

A. I didn't notice any at the time.

Q. Was there more than one automobile parked there at the time?

A. Not that I noticed, no, sir.

Q. Did you go over to the boy?

A. Yes, sir.

Q. Did you see Mrs. Ericson there at the time you got there, or do you remember?

A. I don't remember. There was one or two ladies there, and, of course, in just a minute there was fifteen around there.

Q. Are you able to judge the speed of trains, or the approximate speed of trains?

A. Well, I drive an automobile, and have driven it for awhile.

[fol. 154] Q. About how fast would you say that train was going, after it crossed over Bond Avenue there?

A. Well, it was not going very fast. I don't think it was going over five or six miles, because by the time I run around four or five cars, I really got there before the train passed—I ran around it.

Mr. Costello: You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. Then, by the time you got there all the cars had nearly passed over, had they?

A. Got where?

Q. When you got to the scene of the accident.

Q. Well, not all of them. There was possibly—when I first saw the accident there might have been——

Q. Just answer my questions, please. How many cars were there left to pass over when you arrived?

A. Do you mean when I arrived at the boy, when I——

Q. When you saw what was going on and went right into the scene of the accident there, how many more cars passed over before the track was entirely cleared.

A. Not over six or seven.

Q. Do you know how many were in this train, altogether?

A. No, sir.

Q. Immediately when you heard some — scream, did you go to where that scream was?

A. I was intending to go to the automobile where the scream came from, and looked up and saw one lady hold her hands over her eyes, and was pointing, and, naturally, I looked the same way.

Q. You had been walking on Eighth Street?

A. South on Eighth.

Q. You had not been walking on Bond?

A. After I turned off Eighth I turned on Bond, yes.

Q. You did not see this accident at all, as I understand?

A. How the boy got there?

Q. You did not witness the boy getting struck, or anything of that sort?

A. No, sir; I didn't.

Q. When you got over to the scene of the accident the cars had passed by, except possibly six or seven?

A. Yes, sir.

Mr. Miller: That is all.

Mr. Costello: That is all, Mr. Rieken.

[fol. 155] JOHN FRITZ, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. You may state your name, please.

A. John Fritz.

Q. Where do you live?

A. 1731 Goethe Avenue.

Q. What is your business?

A. Terminal Superintendent.

Q. For whom?

A. Southern Railway Company.

Q. Were you Terminal Superintendent for the Southern Railway Company on March 3rd, 1927?

A. Yes, sir.

Q. How long have you been in the employ of the Southern Railway Company?

A. Twenty-five years.

Q. You are still working for them?

A. Yes, sir.

Q. Mr. Fritz, I will ask you if you are familiar with the tracks that run from the Dyke Yards of the Southern Railway Company to the Coapman Yard of the Southern Railway Company?

A. Yes, sir.

Q. Are you familiar with the grade of the track from the Dyke yards up to, say Tenth Street?

A. I know there is a grade from the I. C. crossing to Tenth Street.

Q. About how much of a grade is it, if you know, Mr. Fritz?

A. I couldn't say what the grade is.

Q. Are you familiar with engine No. 1894 of the Company?

A. Yes, sir.

Q. I will ask you to state, if you know, Mr. Fritz, whether or not there is any cow-catcher on the front of the engine?

A. No, sir.

Q. Or is there any on the rear of the engine?

A. No, sir.

Q. I will hand you a picture which has been marked "Defendant's Exhibit No. 5", and ask you to state what that is?

A. That is the front end of engine 1894.

Q. Does that correctly represent the front end of engine 1894, as it existed on March 3rd, 1927?

A. Yes, sir.

Q. I will hand you a picture which has been marked "Defendant's Exhibit No. 6", and ask you to state what that is?

A. That is the rear end of engine 1894.

[fol. 156] Q. Does that correctly represent the condition of the rear end of engine 1894, on March 3rd, 1927?

A. Yes, sir.

Q. You did not have occasion to be any place near the scene of the accident, did you, Mr. Fritz?

A. No, sir.

Q. When was the first you heard of an accident having happened?

Mr. Miller: I submit that is wholly immaterial, when he heard of it.

The Court: It does not make any difference when Mr. Fritz heard of it. Objection sustained.

Mr. Costello: That is all.

Cross-examination.

By Mr. Miller:

Q. You do not know anything about this accident, do you?

A. No, sir.

Q. You are an official of the Company?

A. Yes, sir.

Mr. Miller: That is all.

Rawlings Guthrie, a witness of lawful age, being duly produced, sworn and examined, testified in behalf of the defendant as follows:

Direct examination.

By Mr. Costello:

Q. State your name.

A. Rawlings Guthrie.

Q. Where do you live, Mr. Guthrie?

A. 3733 Lindell Boulevard, St. Louis.

Q. What is your business or profession?

A. Assistant Engineer, Maintenance of Way, Southern Railway Company.

Q. How long have you been in the employ of the Southern Railway Company?

A. About five years.

Q. Were you working for the Company along in March of 1927?

A. I was.

Q. I will ask you if you had occasion to make a map showing the location of the railroad tracks, and different objects in the neighborhood of the crossing of the Southern Railway Company, with Bond Avenue, in the City of East St. Louis.

A. Yes, sir.

[fol. 157] Q. The measurements of the distances were made by whom?

A. I made them personally.

Q. Have you a map showing different objects and distances?

A. I have (producing map).

Q. I will hand you a map, which I will have marked "Defendant's Exhibit No. 7", and ask you to state what that is.

A. A map showing the Dyke Branch of the Southern Railways, from approximately Tenth, just north of Trendley Avenue, to a point south of Trendley.

Q. Does it show the crossing of the railroad with Bond Avenue?

A. It does.

Q. Does it show the number of tracks that are at this crossing?

A. It does.

Q. Does it show the location of the school building known as the Franklin School?

A. It shows the location of the school house.

Q. Does it show any fence that was around the schoolyard of the Franklin School?

A. It shows the fence on Bond Avenue, and one along the railroad tracks, one inside the schoolyard.

Q. Do you know, of your own knowledge, the kind of fences those were?

A. That was a board fence.

Q. Just answer yes or no, first?

A. Yes, sir.

Q. What kind of a fence was running parallel with the railroad tracks?

A. Starting at Bond Avenue, running south for a short distance, was a picket fence; from there south to Market Street was a solid board fence.

Q. On Bond Avenue, what kind of a fence was there?

A. Starting at the right-of-way of the Southern Railway, running west on the south side of Bond Avenue, was a picket fence.

Q. How high were those picket fences?

A. The picket fence was about 4.5; four feet, six inches.

Q. Inside of the school yard, and running parallel with the fences that run parallel with the railroad track, was there any other fence?

A. There was a picket fence running south, parallel to the right-of-way fence.

Q. How far from the parallel right-of-way fence is the picket fence that you have just referred to?

A. I will have to refer to my notes.

Mr. Miller: I want to make a little inquiry here, your Honor.

[fol. 158] The Court: Very well.

By Mr. Miller:

Q. Did I understand you to say that what you have testified to was the condition of those fences on March 3rd, 1927?

A. These measurements were made on March 10th, 1927.

Q. You testified, just a moment ago, as I understood you, that what you had on there was the condition on March 3rd. What I want to get at, were you in East St. Louis, on March 3rd, 1927, in the vicinity of Trendley and Bond Avenues?

A. Not that I recall.

Q. Did you have occasion to examine that school fence on that day?

A. Not on that day, no.

Mr. Miller: I object to any drawing that he made, your Honor, which is bottomed upon information gained at a later date.

Mr. Costello: May I ask one question, and clear it up?

The Court: You may ask it, and I will see.

Direct examination resumed.

By Mr. Costello:

Q. Mr. Guthrie, at the time you examined the fences, on March 10th, 1927, were you able to tell whether or not those were fences that had been there for some time, or whether they were newly erected fences?

A. The fences had been there some time.

By Mr. Miller:

Q. I will ask you whether or not you know that any portion of that fence was down, or was up, on March 3rd, that was not down or up on March 10th?

A. From the condition of the fence, it had been there some little time. There were no new planks or new posts of any kind, that had been installed.

Mr. Miller: Your Honor, I renew my objection again, to the introduction of a map drawn upon information which was acquired one week subsequent to the date of this accident.

I submit this witness should show that the conditions that he has outlined in his map, where the same on March 3rd as they were on March 10th.

The Court: Oh, there is a limit, of course, to that sort of thing, and it must be a reasonable limit. He made this [fol. 159] map, he says, one week exactly after this accident occurred. If you ran the argument down to its final analysis, you would require the map to have been made at three o'clock and thirty-one minutes P. M. on March 3rd, 1927, and we can not require that.

He says that the fence bore every evidence of being old, and not new, and I think, within seven days, there may well be——

Mr. Miller: I withdraw the objection.

The Court: If there was anything to indicate that it was, I would sustain the objection. That is the reason I sustained the objection to your pictures, because, clearly, something had been taken away, by all the evidence.

By Mr. Costello:

Q. You may answer, Mr. Guthrie, how far is the parallel fence that is in the schoolyard, from the parallel fence along the right of way?

A. Thirteen feet.

Q. I will ask you to state, if you can tell, where the fence is that ran perpendicular to the parallel fence along the right of way, and in the schoolyard.

A. At the east end of that fence it is 48.8, and at the west end it is 48.3, from the fence on Bond Avenue, on the south side of Bond Avenue.

Q. Describe the kind of fence that is inside of the schoolyard, that runs perpendicular to the picket fence that runs parallel to the railroad track.

A. That was a five foot board fence, solid board fence.

Q. Were there any gates in that five foot solid board fence, Mr. Guthrie?

A. There was not.

Q. Was there any evidence showing that there had been a gate in that solid board fence?

A. There was not.

Q. I will ask you to state whether or not there was a concrete walk leading from the east door of the school building down toward the railroad tracks.

A. There was.

Q. And did that walk parallel the solid board fence that you have referred to?

A. It did.

Q. Was there a walk leading from that walk that paralleled the solid board fence, out to Bond Avenue?

A. There was.

[fol. 160] Q. And how far was that walk that ran parallel to the railroad track, from the picket fence that ran parallel to the railroad track?

A. I don't know, exactly. It was between the two fences, the two parallel fences to the railroad track.

Q. What was there with reference to gates on Bond Avenue, Mr. Guthrie?

A. There was a gate at a point sixty-eight feet west of the center line of the west track, the most westerly main track—going into the National Refining Company. There was a gate two hundred and six feet from the west track.

Q. The gate two hundred and six feet from the west track, can you tell us where that was with reference to the entrance of the school, on Bond Avenue?

A. It entered to the approximate center line of the school building, on Bond Avenue.

Q. The gate you referred to as being sixty-eight feet from the center line of the westbound main track, how far was that from the corner of the parallel fence on Bond Avenue with the fence along the school property, on Bond Avenue?

A. About thirteen feet.

Q. And that gate was in which fence?

A. That was in the picket fence, on the south side of Bond Avenue.

Q. Did you make an examiantion, Mr. Guthrie, to determine the approximate height of the entrance of the school

building, on the east side of the school, over and above the sidewalk leading up to the entrance?

A. I did.

By Mr. Miller:

Q. May I ask when you made that examination?

A. I made all these original examinations on the same day.

Q. On the tenth?

A. Yes, sir; this is as of that date.

By Mr. Costello:

Q. How much higher was the floor of the entrance there above the sidewalk leading up to the entrance, Mr. Guthrie?

A. 1.16, approximately one foot, two inches—two steps.

(At this point a recess was had for ten minutes, the Court having first duly admonished the jurors as to their proper conduct touching the case while they shall be absent from the court room.)

After recess, at 3:45 P. M. the hearing progressed as follows:

[fol. 161] Direct examination resumed.

By Mr. Costello:

Q. Mr. Guthrie, calling your attention again to "Defendant's Exhibit No. 7", I will ask you to state if that exhibit shows a watchman's tower, that was at the intersection of the railroad tracks and Bond Avenue?

A. It does.

Q. On which corner of the intersection is that tower, Mr. Guthrie?

A. On the southwest corner.

Q. Is it marked on the blueprint?

A. It is.

Q. Does that exhibit show anything with reference to whether or not there were any gateposts at the intersection?

A. It does.

Q. Where are those gateposts located, Mr. Guthrie?

A. Between the property line and the curbline of Bond Avenue, both east and west of the three tracks.

Q. How many posts are there altogether?

A. Four.

Q. Mr. Guthrie, I now hand you a picture that has been marked "Defendant's Exhibit No. 3", and ask you to state if you know what that represents.

A. A picture looking west from the center line of Bond Avenue.

Q. Does that picture, which I have just handed you, marked "Defendant's Exhibit No. 3", show the gateposts concerning which you have testified as being on "Defendant's Exhibit No. 7"?

A. It does.

Q. Does that show the watchman's tower?

A. Yes, sir.

Q. And does it show the school?

A. It does.

Q. Does it show the sidewalk in front of the school?

A. It does.

Q. Does it show the picket fence running parallel with the railroad tracks?

A. It does.

Q. Does it show the picket fence running parallel with Bond Avenue?

A. Yes, sir.

Q. Does it show the solid board fence running perpendicular to the picket fence along the right-of-way of the railroad tracks?

A. It does.

Q. Does it show the east entrance to the school building?

A. It does.

Q. Will you look at "Defendant's Exhibit No. 7", and state what the width of Bond Avenue is, from curb to curb?

A. Thirty-six feet.

[fol. 162] Q. How is it surfaced?

A. Brick street.

Mr. Costello: I now desire to offer in evidence "Defendant's Exhibit No. 7". You may inquire, Mr. Miller.

Cross-examination.

By Mr. Miller:

Q. Does this show the distance from the point here (indicating on exhibit)——

A. The distance from the point of the switch at Tenth Street to the center of Bond Avenue, is shown on the exhibit.

Q. Do you recall what that distance is?

A. If I may look at the exhibit again. (After examining exhibit) 16.86 feet to the center line.

Q. Mr. Guthrie, you were not, as I understand it, over in East St. Louis, near Eighth and Bond Streets, on March 3rd, 1927?

A. I was not, no, sir.

Q. And as to what the exact conditions were that were prevailing at that time, you do not know, do you?

A. No, sir.

Q. Did I understand that you went over there on the tenth?

A. Yes, of March, 1927.

Q. That was about a week after this occurrence took place?

A. Seven days.

Q. You have never testified previously in this case?

A. No, sir.

Q. By whom do I understand that you are employed?

A. Southern Railway.

Q. That is the defendant in this case, of course?

A. Yes, sir.

Mr. Miller: That is all.

Redirect examination.

By Mr. Costello:

Q. Mr. Guthrie, have you been in court every time this case has been set?

A. No, sir.

Q. Were you in court the last time it was set?

A. No, sir.

Q. You had the blueprints all the time, did you; the blueprints have been in possession of the Railroad Company?

A. Of the Railroad; yes, sir.

Mr. Costello: That is all.

Mr. Costello: The defendant rests, your Honor.

Defendant Rests.

[fol. 163] The Court: Is there anything in rebuttal?

Mr. Miller: I desire to offer in evidence what has been identified as "Plaintiff's Exhibit H".

Mr. Costello: May we look at it first, your Honor?

The Court: Yes.

Mr. Costello (after examining exhibit): We have no objection to "Plaintiff's Exhibit H".

Mr. Miller: If you have no objection, I will read it. (Reading:)

PLAINTIFF'S EXHIBIT "H"

"Mrs. Ruth Erickson 500 So. 6 St. E. St. Louis Ill.
Husband Barber Shop 603 Bond Ave.

I was walking Eastward, toward the R. R. crossing, on the North side of Bond Ave.

When I saw the boy first he was on the ground alongside the West side of the train and the wheels were passing by him.

I do not know how many cars had passed the boy when I saw him first but I know I did not see the Engine. The train was not moving so very fast. It did not stop.

There were no gates down.

There was a gateman's tower on the west side of the tracks but no gateman or flagman there.

There was no trainman on the crossing that I could see.

Had no knowledge of what occurred at the crossing before seeing the boy sitting alongside the train.

(Signed) Ruth Erickson.

To CJRea 4/27/27 at 500 S-6th St E St Louis Ill."

Mr. Miller: Plaintiff rests, your Honor.

Which was all of the evidence offered in the case.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Thereupon the defendant offered and filed the following request for an instruction, and prayed the Court to instruct the jury as follows:

[fol. 164] At the close of all the evidence in the case the Court instructs the jury that under the law, the pleadings

and the evidence, plaintiff is not entitled to recover, and your verdict must be for defendant.

Which said request for said instruction, offered and filed by the defendant, was by the Court denied, and the Court refused to give the said instruction, and to the action of the Court in refusing to give said instruction, the defendant, by its counsel, then and there, at the time, duly excepted.

Counsel for both parties made their oral arguments to the jury, and thereafter an adjournment was taken until November 15, 1929, at ten o'clock A. M., the jury being duly admonished touching their conduct in the case.

Met pursuant to adjournment as above, on November 15, 1929, the same parties as before being present.

CHARGE TO JURY

Whereupon the Court charged the jury as follows:

The Court: Gentlemen of the jury, you have very patiently listened to the evidence in this case, and to the arguments of counsel, and it now devolves upon the Court to give you in charge the law that ought to govern yon in your deliberations on your verdict. You are not able, gentlemen, to obtain the law which applies to this case, and which law shall govern you in your deliberations upon what verdict you shall render, save and except from the oral charge given to you in that behalf by the Court.

I need scarcely say to you, therefore, that you are to be strictly bound by the law as the Court shall declare it to you in this charge. You are not to consider whether it ought to be the law or not, but you are to take it as the law, and to follow it, under your oaths of office as jurors.

In this connection, gentlemen, I need scarcely say to you that there is but one sort of law, and that law applies equally and in equal measure to every party to a law-suit. I mean by that, that the same law applies to a case where a corporation is a party as applies to a case where an individual is a party. It is your duty, then, to take this case and con-

sider it, not on the viewpoint that an individual is the plaintiff, and a corporation happens to be the defendant, but to consider it just as if an individual were plaintiff and an individual were defendant, or as if a corporation were plain- [fol. 165] tiff and a corporation were defendant. This, I repeat, is so because there is but one sort of law, and that law applies equally to all parties who come into a court, in order to have a jury determine their rights. You ought to consider it just as if it were a law-suit between individuals, where a promissory note, I will say, for example, were involved.

We would not be human if our sympathies did not go out to the plaintiff in this case, but it is not a case for sympathy, gentlemen. It is a case for the application of the cold rules of law just, I repeat, as you would apply those rules if two individuals were the parties.

Now, this is a case, as you know without my saying so, for damages, brought by the plaintiff, through his next friend, because he is a minor, against the defendant, on account of injuries which the plaintiff sustained, as he says, by the negligence of the defendant. So, gentlemen, it goes without saying, that plaintiff can recover here only by showing that the hurts, the serious hurts, which he sustained, were brought about by the negligence of the defendant. The mere fact that he was hurt, however seriously, does not entitle him to a judgment against the defendant, to recoup him or make him whole for those hurts, in a monetary way, unless the defendant was to blame, and when I use the word "blame" I mean unless the defendant was negligent, within the purview of the charge or charges made against the defendant.

The petition alleges various grounds of negligence, some four or five, I believe. But in the view I take of the law of this case, gentlemen, there is but one of the alleged acts of negligence which I ought to let go to you for your determination, that is, for you to determine whether the defendant was guilty of that one ground of negligence, or whether it was not. If it was guilty, of course within the charge of the Court and upon the facts as you have heard them, then you are warranted in finding for the plaintiff. If it was not guilty, upon the evidence and within the charge of the Court,

you cannot find for plaintiff, and must find for defendant. So, that is the question here.

Now, I need not give you my reasons, or take up time in telling you the reasons that I have in mind, which are bottomed upon the law as I see it, why I take from you every alleged act of negligence, save one. It would but confuse you, perhaps, if I did so. But I shall venture to tell you briefly a single reason, or so, why I take this view, and then shall tell you, as I now tell you, that you must cast [fol. 166] out of your minds those things, and consider only the single act of alleged negligence that I put to you.

It is said that the train was running too fast: That has not, under the law, been proven, so, I take that from you. The question of how fast the train was going, in this case cuts no figure, considered as an act of negligence. If you are to consider it, you are only to consider it in the light of the question of whether the train stopped or not before it crossed Bond Avenue. Whether it has any bearing as throwing light upon that question, I leave to you. But you may not, and cannot, under the law here, consider the rapidity with which the train was driven, as an act of negligence. The only bearing, I repeat, that it can possibly have in this case—and that I leave to you—is upon the point of whether it came to a halt before it crossed Bond Avenue.

It is alleged that the trainmen could have halted this train, prevented this injury, before the boy was hit. That is what we call in law the humanitarian doctrine. But there are no elements in this case which, under the law, require an application of that doctrine. In this Court, in all Federal Courts, and, I believe, in Illinois, perhaps as well (though that cuts no figure), the humanitarian doctrine cannot be invoked as an act of negligence unless those persons in charge of the train actually saw the plaintiff in a place of danger, and could, by the exercise of ordinary care, with the appliances at hand, have stopped that train before it hit him and hurt him. But there is not one scintilla of evidence in this case that anybody on that train ever saw this plaintiff before he was hurt. So, there is no ground here for the application of the humanitarian doctrine, sometimes called the last-chance doctrine. Therefore you will cast that out of your minds.

There is a charge of negligence bottomed upon the alleged failure of the persons in charge of that train to blow a whistle, or ring a bell. As to that, I say to you that, first, there is no evidence of such failure, except negative evidence. On the other hand, there is affirmative evidence that the whistle was blown and the bell kept constantly ringing, by reason of an automatic air-operated bell ringer. That would be a sufficient reason, but another one, also in the case, disposes of that alleged ground of negligence. That other one is that the plaintiff himself admits that he saw that train. He knew it was coming; he saw it coming. Then, having seen it coming, the fact whether the whistle was blown or the bell rung, cuts no figure in the case. All that the whistle could have done, all that the bell could [fol. 167] have done, was to apprise him of the fact that that train was coming. Since he knew it was coming, because he saw it coming, no negligence can be bottomed upon the failure to ring a bell or blow a whistle. That is common sense, and that is the law; that even though there be an absolute requirement upon those in operation of a train to blow a whistle and to ring a bell, yet, if the man or person who is hurt, tells you that he saw the train, then the whistle or the bell could have added nothing to the situation.

Now I call your attention to the one alleged act of negligence in this case, which I leave to you. There is a law in Illinois, which confers upon the Illinois Commerce Commission (a commission over there, as I understand the law, similar to the Public Service Commission of the State of Missouri) power to regulate these matters. Under the statute, their orders in the regulation of railroads, have the force and effect of law. Both sides here, as I understand their attitudes, concede that fact.

There had been in use over there, at a point near Eighth Street (perhaps it was a part of Eighth Street), where Bond Avenue crosses Eighth Street, gates, with which you gentlemen are familiar, long poles or rods; four of them, I assume, one on each corner of the street. These had formerly been raised or lowered, so as to stop traffic when a train was coming. I mean, lowered, so as to stop traffic when a train was coming, and kept raised when the way was clear. A watchman had been there to take charge of this situation, and attend to the raising and lowering of

those gates. But it had been agreed and ordered, some time in October, 1926, by the Illinois Commerce Commission, that this watchman and that these gates should be taken away. An order had been made by the Illinois Commerce Commission, however, which order, in all substantial effect, provided that the defendant here, as a condition precedent to the removal of those gates, and the taking away of the watchman, should "protect said crossings by requiring all of its trains (that is, the trains of the defendant, Southern Railway) before passing over said crossings, to come to a stop and to require one of the crew of said trains to flag said crossings and warn all persons attempting to cross said crossings, of the approach of said train."

Now, that is the order. It is charged that the defendant here did not comply with that order, and that its failure to [fol. 168] comply with that order caused the hurt of the plaintiff here. I say to you, as a matter of law, that the defendant was required to comply with that order. If it did comply with that order, then it was not guilty of negligence, and you cannot find against it. If it did not comply with that order, then it was guilty of negligence, and you are warranted in finding for plaintiff, because of its failure to comply, for the simple reason that its failure to comply would constitute negligence. The question then for you is, upon that point, the decisive question in this case: Did it comply? If it did, find for the defendant; if it did not, find for the plaintiff. That is all there is to this case, gentlemen.

The evidence upon that point is conflicting. You are to take that evidence, as given by the witnesses for plaintiff, and as given by the witnesses for the defendant, and reach a conclusion as to whether the evidence that it did not comply preponderates, and is of greater weight (as I shall hereafter define those terms) than that of defendant, that it did comply.

On the part of plaintiff, upon that point, a brief résumé of the testimony of the witnesses runs about like this: Mrs. Pettit, the first witness who was brought on the stand, did not see the boy struck or hit by the engine or train at all. When she got up there, she says, the engine and a few

cars were across (she means, I take it, across the street); that they were across when she first saw it.

Mrs. Odell did not see the engine or cars cross Bond Avenue. She says that two or three cars had crossed before she got up near it, or near enough to see it distinctly. One of these witnesses—I do not recall now which one, and it does not make any difference which one it was; it was one or the other of the two, that is, either Mrs. Pettit or Mrs. Odell—tell you that they saw the train down some seventy-five feet south of the crossing. I think that was Mrs. Odell. She says that she did not see the engine and cars cross Bond Avenue. Why, I do not think she tells you, because she tells you (I think it was she) that she saw it when it was seventy-five feet south of the crossing. She says she saw nobody on the tender, and she also says that she was there ten or fifteen minutes before the train got clear by.

Mr. O'Heher, or Mr. Heher—I do not recall whether the Hibernian prefix applies to him or not; some witnesses [fol. 169] called him Mr. O'Heher and some called him Mr. Heher—tells you that when he first saw the train he was a half block away; that at about that point, or perhaps at that point, he heard a woman scream, and that he heard that scream about ten minutes after he first saw the train.

Mr. McKenzie saw only the hind end of the engine.

Neither of these four witnesses saw the actual occurrence of the boy being struck; neither of them tells you how he was struck, by what part of the train he was struck, or anything about it.

Now, I might call your attention, briefly, to the testimony of Mr. Rieken and Mrs. Erickson, who were brought forward by the defendant, upon that point. Mrs. Erickson tells you that she was the very first person who reached the boy; that she was about a block away when she first saw the train; that she did not see the engine, but that she only saw the cars passing along; that when she reached the boy, after walking a block, I take it, he was lying there hurt, and that other women afterwards came. Mr. Rieken tells you about the same thing.

The testimony of Mrs. Erickson and Mr. Rieken bears only upon the accuracy of the witnesses, Mrs. Odell and Mrs. Pettit, and, to an extent, upon that of Mr. Heher and Mr. McKenzie.

Then we come to the three witnesses on the part of the plaintiff, including among the three, or as making up the three, the plaintiff himself. The little girl, Ruth Sheeley, tells you that she saw this accident; that she was on a landing in a school building; that that landing led upwards, into the main building, and downwards into the basement; that there were two steps upward and ten steps downward; that she was looking out of a window in a door, which door led outside of the building, I take it; that she was looking through a board fence, by reason of an opening, which she says was there, caused by the sagging upon its hinges, of a door or gate, which was in that fence; that that was a tight board fence; that she looked through that opening made by the lack of a gate or door, through a picket fence, and saw this boy struck by the front end of the train. She tells you that she could not see through that fence, except on account of the opening that she says was there; that she could not see over it, because of the board fence, and of the pickets which intervened between the point at which she was and [fol. 170] the point of the accident. The fence was a foot higher than she was, an- apparently (though I leave that to you) the picket fence was much nearer the point of the accident than was the point at which Ruth Sheeley was standing. She says she say the boy struck by the front part of the train. She also says that she saw him picked up by some man, who came through the train.

Mrs. Odell tells you that he was picked up by some man, who passed from the east side of the train, where she and Mrs. Pettit were, to the west side of the train, between the cars, and picked up the boy, who was on the west side. I mention that, not as having any bearing upon the question of whether the front part of the train hit the boy, or whether he was hit by some other part of the train, but as bearing upon the rapidity with which that train was moving. It is for you to consider whether it has any bearing upon that question, and, as I have said to you, the rapidity with with which the train was moving has no bearing here, save and except as an incident, which you may consider if you see fit, in order to ascertain whether the train stopped, or did not stop, before it reached this crossing.

There seems to be no doubt—because it is not contradicted in the evidence—that a man did come through between two of the cars, while the train was moving; while it

was going across Bond Avenue, and picked this boy up. I think Mrs. Erickson says that, Ruth Sheeley says it, and Mrs. Odell tells you that, and nobody denies it.

Now, the boy, Jimmie Goodwin, about eleven years old, tells you that he was standing at a telegraph pole, apparently at the school house corner, leaning against the pole, and that he saw plaintiff hit by this train. He tells you, however, that he was hit by the engine, but there was a box car in front of the engine. He does not tell you that he was hit by the front of the train. You may consider, then, that testimony as bearing upon the question of whether the front part of the tender, which was clearly in front—the rear end of it in front—hit him, or whether he was hit by the engine, which was behind the tender, and whether Goodwin mistook the tender for a box car. That, in substance, is the testimony of the boy, Jimmie Goodwin.

The testimony of plaintiff, Edward Walters, is that he, and three or four other boys, were going by; that as he came up he looked and saw the train. As I recall his testimony, he tells you one time that it was coming north; and another time that it was going south. All of the witnesses [fol. 171] now agree that it was moving north. He says that the other boys got by; that he was walking slowly; that the front end of it hit him and knocked him seven or eight feet, and that he does not remember anything further about it.

Neither Mr. Ward nor Mr. Heher saw the boy struck. Their testimony bears upon only incidental matters.

We have three witnesses for the plaintiff, who tell you substantially what I have said to you, in order to refresh your memories.

On the part of the defendant, Mr. Lane tells you that he was foreman there, in charge of that operation; that they were going from what is called the Dike Yard to the Coapman Yard; that he was riding on a little bench, or platform, of which there were two on the rear of the tender; that Mr. Stewart was riding on another platform, also on the rear of the tender; that Mr. Stewart was on the east side, and he (Mr. Lane) was on the west side. These platforms, by reason of the fact that the tender was in front, were, of course, on the front of that train, notwithstanding they were on the rear end of the tender. He tells you that the train came up, and came to a stop; that he got off, went into

the middle of the street, and ran some boys away—whether this plaintiff or not, does not appear; nobody knows, nobody says, or attempts to say—that he then signaled for the crossing. The train started up; that while it was moving he stepped on it again, on to this little platform, and they proceeded north.

Mr. Stewart tells you that he was on the east platform, on the front of the train; that Mr. Lane stepped off, went to the middle of the street, ran some boys off, signaled the train to come on (which at that time was stopped) and that they moved on.

Mr. Luscomb, the engineer, and Mr. Knight, the supervisor—who was riding at that time as a passenger, merely in order to get from one point of his duty, I imagine, to another point—tell you about the same thing; that Lane got off, that the train stopped, that Lane signaled the train across, got on, and the train went on.

Mr. Woodside was on the east side. He was the fireman. He does not know as much about it as the others do.

The rear brakeman, the rear switchman, was on the extreme rear. He tells you that the train stopped. All five witnesses for the defendant, who were on that train, and [fol. 172] who (except Mr. Knight) constituted the train crew, tell you that the train stopped. Mr. Knight tells you that, also, notwithstanding he was not a member of the crew.

The question then is, to whom shall you give the greater credit here; to the testimony of the witnesses for plaintiff, including plaintiff, or to the testimony of the witnesses for the defendant? The testimony of these witnesses bears squarely upon the crucial question in the case, that is, as to whether that train came to a stop; whether it was flagged across, or whether it was not flagged across, or whether it was not flagged across, and did not stop. It was necessary for it to stop, and to be flagged across.

The testimony of Mr. Lane, if you shall believe it, shows that it was stopped, and was flagged across, substantially in compliance with the rule requiring it to stop, and requiring it to be flagged across.

The testimony of the witness, Ruth Sheeley, as well as Jimmie Goodwin, and the plaintiff himself, tends to show that it was not. Some of the testimony of other witnesses for the plaintiff tends to corroborate them. Some of the

witnesses, in addition to those I have named, on the part of defendant, tend to show that it was stopped; and, as I said a while ago, you may consider the evidence of Heher, as to the time. He puts it at ten minutes.

You may consider the evidence of either Mrs. Pettit, or Mrs. Odell, as to the time it took it to cross. One of them says ten or fifteen minutes. You may consider the evidence of two or three of the witnesses, as to the man passing between the cars, in order to get this boy, as bearing upon that question, and such other evidence, of course, as you find in the case, which, in your minds, has a tendency to elucidate that point.

That is all the negligence in the case, gentlemen. When you have decided that question, you have decided this case. If the defendant stopped that train, and flagged it across, you ought to find for defendant. If defendant did not stop it and flag it across, you ought to find for the plaintiff. You cannot, of course, find for plaintiff unless defendant was guilty of that act of negligence. Whatever else it may have omitted to do, or whatever else it may have done, would not warrant you in finding for plaintiff. You can only find for plaintiff if you find that defendant was guilty of the single act of negligence that I have called your attention to. If it [fol. 173] was, then, I repeat, you ought to find for plaintiff; if it was not, you ought to find for defendant.

The mere fact that plaintiff was seriously and regrettably injured, would not warrant you in finding for him, unless you find that defendant was negligent in the behalf that I have stressed.

If you shall find for plaintiff in the case, you are warranted in rendering a verdict in his favor for such sum, not exceeding, of course, the amount claimed in the petition, as in your judgment will reasonably compensate him for the suffering and pain resulting from the injury, and for the loss of his leg, as well as the injury to the three toes of his left foot: for the inconvenience to which he has been put, and to which he will likely be put during the remainder of his life, in consequence of the loss of his leg, and these other injuries; for the mental suffering, past and future, which you may find to be the natural and necessary consequence of the loss of his leg, and of the loss of the three toes; and, further, for such pecuniary loss as will directly result from the injuries, and which he will reasonably be liable to sustain hereafter, in consequence of his being de-

prived of one of his legs, and of the three toes. You are not to consider any such pecuniary loss accruing to him, however, until he is twenty-one years of age. That is so because, under the law, his parents are entitled to the pecuniary worth of his services until he is of age, and such loss will not fall upon him, but upon them.

Now, gentlemen, there is another phase of the law to which I shall call your attention. There is in the law a doctrine called contributory negligence, that doctrine, in simple language, provides, and says to a plaintiff, ordinarily, if you were guilty of contributory negligence, which contributory negligence contributed to and formed a proximate cause, of the hurt which you sustained, you can not recover, even though the defendant was negligent. However negligent a defendant is, if plaintiff is himself guilty of contributory negligence or guilty of negligence without which the accident would not have occurred, notwithstanding defendant's negligence, the plaintiff can not recover.

The evidence in this case, on the part of plaintiff himself, clearly shows such acts on his part as would if he were an adult, or if he were, say thirteen or fourteen years of age, constitute, as a matter of law, such contributory negligence as would bar his recovery. I should have no hesitation in say- to you, if he were a grown person, or if he were even, [fol. 174] say fourteen years of age, that he could not recover here, as a matter of law, because of his admitted contributory negligence. But the law, gentlemen, does not require of a child of tender years the exercise of the same sort of judgment, of the same sort of appreciation of dangers confronting him, as it does of a person fourteen years of age (I merely suggest that by way of example), or of a person who is twenty-one years of age.

You are to consider, then, in determining whether the contributory negligence, plainly here in this case, should apply to one of the tender years of this plaintiff. He was at the time, I believe, a little over six years of age——

Mr. Miller: A little under six years of age, your Honor.

The Court: He was, I repeat, at the time of his hurt, a little under six years of age. He was going to school; he had been going to school for some three weeks. His home was somewhere east of this crossing, so that, it seemed to be necessary for him to go across this railway crossing four times a day, in going to school in the morning, in going to

his lunch at noon, in coming back after lunch, and in going home at night. He had been doing this for some three weeks.

You may consider, in reaching a conclusion, whether, his age considered, his education considered, his experience considered, his intelligence considered (as you deduce that from what you have seen of him, of course), he possessed such judgment, such experience, and such appreciation of the dangers confronting him, as would make him, or not, guilty of contributory negligence. If you find that all of these things, including, of course, his tender years and experience, knowledge of that train, the times he had crossed, and all that sort of thing, did make him so appreciate it as that he knew it might hit him and hurt him, and that he knew what injury would accrue from his being hit, then you may apply the doctrine of contributory negligence to him. If you do not think he possessed that appreciation of danger and that judgment, then you ought not to apply it to him. You are, in other words, to consider whether a person of his age, and with his education and experience, would reasonably have appreciated those things. If you can, put yourselves in his place, which I recognize is practically impossible. In other words, you are to consider him as of his age, and say whether a reasonably prudent and cautious person of his age, experience, education, observation and intelligence, would have done the thing which he did, or [fol. 175] would not have done it. If you find that he did not come up to the criteria of a reasonably prudent and cautious person of his age, experience, education, intelligence, and so on, as I have mentioned those attributes to you, then, of course, he was not guilty of contributory negligence.

You are not to test his judgment of danger, and his experience, as you would that of a grown person, or of a person, say fourteen years of age, because, I say to you, that if you did that you ought to find instantly for defendant, and if that had been the case, I should have charged you already to find for defendant.

Of course, the ordinary care that plaintiff was required to use for his own safety, is to be measured by the facts and circumstances attending the entire situation. I should have included that a moment ago.

Now, gentlemen, I said to you a while ago, that the Court is the sole judge of the law. With that you have nothing to

do. You are merely, under your oaths of office as jurors, to take the law as the Court declares it to you, whether you believe it is the law or not; whether you believe it ought to be the law or not. If I should make a mistake about it, that is my mistake, and the burden of my error falls upon my shoulders. You are blameless, and I am to be blamed. But when we come to the domain of the evidence: when we come to the question of what credibility you ought to attach and give to the testimony of the witness here, who have been presented by plaintiff, and by the defendant, you gentlemen are the sole judges, and not the Court.

In reaching a conclusion as to the weight and credibility which you ought to attach to the witnesses, who have been produced before you and have given their evidence, you are warranted in taking into consideration the manner and appearance of the witnesses on the stand; the probability or improbability of the testimony which they give; their situation to see and observe, and their apparent willingness and capacity to truthfully and accurate relate what they saw and observed. You are warranted, of course, in taking into consideration the ages of these witnesses, and their ability, or inability, by reason of tender years, to correctly and accurately observe, and to correctly and accurately relate what they saw and observed.

You are warranted in taking into consideration the relations to and feelings for the witnesses, that have been produced for the plaintiff, upon the one side, and for the de- [fol. 176] fendant, upon the other. That includes, of course, friendship; it includes employment.

Taking into consideration these things, you are warranted in attaching such weight and credibility to the testimony of these various witnesses as you think, under your oaths of office, you ought to give to them.

The Court is permitted—as I have done in a measure—to tell you what I think has been shown, and what has not been shown. I have done this, in a brief sort of way, in order to call your attention to what seems, to my mind, the salient and decisive evidence in this case. I did it for no other purpose. I have largely refrained from comment upon it. I had the right to comment, if I had seen fit to do so, with the proviso, however, that you are neither bound by my comment, nor are you bound by what I say the evidence was. Because it strikes me that it is so and so, does not

bind you. If you agree with me, you are at liberty to follow me. If, however, you disagree with me, then it is not only your privilege, but your duty, to follow your own recollections.

Of course, when I said the situation to see and observe, that had reference to the location of the witnesses for defendant, and the witnesses for plaintiff, that you may judge of whether they did see or could have seen, what they say they saw.

Now, gentlemen, I have caused to be prepared for you two forms of verdict. If your finding, under the charge of the Court, and under the evidence, should be for plaintiff, you may use the form that I now point out and indicate to you, writing in, in the blank left therein, the amount in damages (not to exceed, of course, the amount sued for, and under the charge as to the measure of damages given you), that you think plaintiff ought to recover.

If your finding shall be for defendant, you will use this form that I point out to you. Both of these forms, however, clearly indicate upon their faces what they mean, and what they say.

When you have agreed upon a verdict, one of your number—it matters not which one—will sign it as foreman, and you will return it into court.

In a federal court, the so-called majority rule does not prevail. Some of you may have served as jurors in a civil case, in a state court, and from that service you know that [fol. 177] in a civil case, such as this is, nine or more jurors concurring may render a verdict, regardless of the views of the other three. But the rule here is wholly different. Your verdict must be unanimous; each of your number, twelve in all, must concur in any verdict which you may render.

(To counsel:) I think of nothing else, gentlemen. If the plaintiff has any suggestions of omission or commission, I will be glad to hear them.

Mr. Miller: If the Court please, in reference to a charge of excessive speed being withdrawn, I do not find that that is pleaded or alleged in the petition, that the train was going at an excessive speed.

Mr. McPheeters: It was argued to the jury.

Mr. Miller: The speed at which the train was travelling was mentioned, but no excessive speed was charged in the

petition. Your Honor made some reference to that, but there is no such charge pleaded.

Mr. McPheeters: That is not in the case.

The Court: Well, I have withdrawn it, anyhow, so it makes no difference. My notion was that it was, but I made those notes when I heard the petition read, and I did not verify them. It makes no difference at all, gentlemen.

You are now told that it is not in the petition. The charge will stand as to this, and the only use that you are permitted to make of it——

(Here ensued private colloquy between the Court and Mr. McPheeters.)

The Court: Well, yes, I think, in fairness, I may do that.

Gentlemen of the jury, counsel has asked the Court to call your attention to the testimony of a witness offered by defendant, Mr. Guthrie, the engineer who, on the tenth day of March, 1927, went over there and made various observations and measurements, and presented a plat to you, with the situation depicted, the distances shown, and the objects shown. He shows the fences, the board fence and the picket fence, and he tells you that there was no opening in that fence, through which Ruth Sheeley could have seen. There were pictures about it, which you gentlemen saw, also. Those pictures were taken about six days after the accident occurred. You are to consider the evidence of Guthrie, for [fol. 178] defendant, upon the point of Ruth Sheeley's testimony.

(To counsel:) Is there anything else, gentlemen?

Mr. McPheeters: That is all, your Honor.

The Court: I will let you have the petition, the answer, and the blank forms of verdict to which I have called your attention. Of course, you are not bound by the allegations of the petition; you are not bound by the answer. Those things merely show you what the issues are, under the charge of the Court. The case is with you.

Mr. McPheeters: Is the jury entitled to the exhibits, if they want them?

The Court: If counsel on both sides agree that they may have them, they are entitled to them. If counsel on both sides do not agree, they are not entitled to them.

Mr. Costello: We will agree that plaintiff's exhibits may be presented.

Mr. Miller: We have no objection, your Honor.

The Court: Very well. Counsel have mutually agreed, gentlemen, that you may have the pictures, the map, and other documents which they deem pertinent. You may now retire to consider your verdict.

And thereafter, to-wit, on the fifteenth day of November, 1929, the jury returned their verdict in words and figures as follows, to-wit:

"UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR SAID DIVISION OF SAID DISTRICT

#8483. At Law

EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend, Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, a Corporation, Defendant

VERDICT

We, the jury in the above entitled cause, find the issues herein joined in favor of plaintiff, Edward Walters a [fol. 179] Minor, by Herman Walters, his father and next friend, and against the defendant, Southern Railway Company, a corporation, and assess the damages of said plaintiff in the sum of Forty Three Thousand Dollars ($43,000.00).

(Signed) Wm. J. O'Connor, Foreman.

November 15th, 1929."

And thereafter, to-wit, on the sixteenth day of November, 1929, within four days after the filing in Court of the verdict, the defendant filed its motion for new trial, which said

motion for new trial is in words and figures, as follows, to-wit:

MOTION FOR NEW TRIAL

Now this day, and within four days after the rendition of the judgment and verdict hereinafter mentioned, comes the defendant and moves the Court to set aside the verdict rendered in said cause on the 15th day of November, 1929, and the judgment thereon, and to grant it a new trial therein for the following reasons:

1. The verdict is so manifestly against the evidence and the weight of the evidence, that it shows it was the result of sympathy for plaintiff, and of passion and prejudice against the defendant.

2. The verdict of the jury is so grossly excessive that it shows it was the result of passion and prejudice.

3. The verdict of the jury shows that it is the result of bias, passion and prejudice on the part of the jury.

4. The verdict of the jury is excessive.

5. The verdict is against the law.

6. The verdict is against the law under the evidence.

7. There is no substantial evidence to support the verdict.

8. The Court erred in admitting incompetent, irrelevant and immaterial testimony and evidence offered by the plaintiff and over the objection of the defendant.

9. The Court erred in rejecting competent, relevant and material evidence offered by the defendant.

[fol. 180] 10. The Court erred in refusing to give to the jury as instruction in the nature of a demurrer to the evidence at the close of plaintiff's case as requested by the defendant.

11. The Court erred in refusing to give to the jury an instruction in the nature of a demurrer to the evidence at the close of all the evidence in the case requested by the defendant.

(Signed) Kramer, Kramer & Campbell, (Signed) Sam B. McPheeters, Attorneys for Defendant."

And thereafter, to-wit, on the second day of December, 1929, defendant's motion for new trial was orally argued to the Court, at the conclusion of which arguments the Court made the following ruling:

The Court: The case has been a very troublesome one for this Court. I very naturally looked for a motion for a new trial, and I very naturally, in my own mind, at least, have given some little consideration to what ought to be the action of Court on a motion for a new trial.

The case has been tried once before, and the jury hung——

Mr. Costello: Twice; once in the Federal Court in East St. Louis, and once in your court, and then this trial.

Mr. Miller: That was not submitted to the jury, in East St. Louis.

Mr. Costello: The Court was going to direct a verdict, and the plaintiff took a non-suit.

The Court: I was not aware of the former trial in another Court; I may have heard of it, but it had slipped my recollection. It seems now, that in some way I had heard of it. At any rate, it had been tried here once before and the jury hung.

It is one of the closest cases I have ever seen, gentlemen. It goes without saying, from a mere inspection of the record in this case, that the witnesses for the plaintiff were most woefully lacking in accuracy of observation. Logically, they crossed one another; no two of them told the same story, or gave the same version of the occurrence.

Ruth Sheeley, categorically stated that she saw the boy struck by the front part of this train, but a serious question [fol. 181] arises as to whether she could see anything or not, from the position at which she placed herself. If the testimony of the engineer, who made accurate measurements, and presumably accurate observations—because he was there for that sole purpose—is to be believed, she could not possibly have seen anything about it, from the point at which she stood. She herself foresaw that contingency and attempted to get around it by claiming to have seen through a gate. As I recall the evidence of the engineer, there was no such gate there. All that went before the jury.

The testimony of the plaintiff himself showed clearly that he was struck by the front of that train, which was, of

course, the rear end of the tender, in the way it was proceeding: that is, moving backward, and not forward.

There are abysmal contradictions, logically considered, in the evidence of plaintiff's witnesses. No two of them saw the thing alike, or came within a thousand yards, if I may so express it, of seeing it alike.

Of course, I have no right, perhaps, to make a finding about the matter myself, in the light of the jury's verdict, or hazard a suggestion as to where the truth lies, amid such diametrical contradictions. If I were to hazard such a thing, I would lean toward the view that the testimony of the witness, James Goodwin, the little boy, who placed himself as leaning against the telephone post, very close to where the accident occurred, came nearer approximating the truth than that of any other witness for plaintiff. I say that, because his testimony logically accounts for many things about which other witnesses in the case testified. It serves to corroborate the witnesses, Lane and Stewart, and others who testified for the defendant, in a sense, at least. It serves to throw great light upon how the thing actually must have happened.

I need not go into the many contradictions. The testimony of plaintiff's witnesses was simply shot full of contradictions. You cannot reconcile them; you can hardly reconcile them on a theory of perjury. You cannot reconcile them on a theory of perjury. You can only reconcile them by saying that they were honest mistakes, brought about through inaccurate observations, and bad recollections.

If, I repeat, I were to hazard a guess as to how this thing actually happened, it would be that this boy attempted to [fol. 182] pass between the rear end of the car and the front end of the locomotive, and that he was caught there, out of sight of the train crew, and injured. That is only a theory, but it seems to be the only logical one in the case.

But there was evidence, gentlemen, from which the jury could have reached some conclusion in the matter. They did reach a conclusion. It was not decided as the Court would have decided it. It has been tried once, and the jury hung. I am anxious to get rid of it. It might be tried a dozen times, and you might have hung juries every time. Juries are human. The boy was an object of sympathy. Clearly, that sympathy played some part in the case, without any

question. It was difficult. It is difficult to look at the little fellow without being almost overcome by sympathy, and juries, I repeat, are human.

I do not know that anything better would be done about it if I were to grant you a new trial, and give you a chance to hang another jury. I have been in great doubt about it. I have the power to grant a new trial, on the ground that the verdict in this case is against the weight of the evidence. There can be no two views about that question, that the verdict in the case is against the weight of the evidence. I take the view that I do not have to grant a new trial on that ground, but I could safely do it, in this Court, under the circumstances here, and perhaps in any Court. The question is, what I ought to do under those circumstances.

It goes without saying, that the verdict is excessive; I think it is grossly excessive, considering the closeness of the case; considering the fact that it is a very close question, all things considered—efforts to reconcile inconsistencies, ambiguities, obscurities, and indefiniteness considered—whether there is substantial evidence in the case. There would be in a state court of Missouri, of course, because the scintilla rule prevails there. It does not prevail here. There must be substantial evidence in the case. I think there was substantial evidence in the case, judged from an evidentiary point of view. I mean by that, taking the evidence at its full value, and giving but little consideration to the indefiniteness and contradictions that are obviously present.

I do not know what I would do in the case if I were considering it on the cold printed record. It is difficult to consider it that way, confronted, as the Court was, by the boy, [fol. 183] and the sympathy that must of necessity arise when you look at him.

I am thoroughly convinced, though, upon one question, that the verdict is excessive. If I had not tried it once before, and the jury had not hung, I would not hesitate to set aside this verdict. As it is, I am disposed to let you gentlemen try the matter out in a Court that has no eye picture of the boy, and his situation, and his lamentable condition. I am going to overrule the motion of defendant for a new trial, on condition, only, however, that within ten days plaintiff shall enter and file in this Court a remittitur for the sum of fifteen thousand dollars, leaving the judgment at

the sum of twenty-eight thousand dollars, which gives him three thousand dollars for the loss of the toes, and twenty-five thousand dollars for the loss of the leg. That, at least, is the way in which I figure it in my own mind.

Lately, a judgment in favor of a man some twenty-three years old, for the loss of a leg, was sustained by the Supreme Court of the United States, at twenty-five thousand dollars. So, in my mind, those figures inhere, twenty-five thousand dollars for the leg, and three thousand dollars for the toes.

I do this, I repeat, gentlemen, with great misgivings. I would be perfectly safe in setting aside this verdict on the ground that it is against the weight of the evidence. I am perfectly frank with you about it. But since, as I have said already, it has been tried twice before—once here and once in another Court, and the juries hung; or, rather, in the first trial a non-suit was taken, and in the trial here the jury was hung—but for those facts, I should set aside the verdict. Under those circumstances, I believe I will let you gentlemen try the matter out in the Court of Appeals, which I think you ought to do, and which I predict you will do.

The witness, James Goodwin, of course did not testify on the first trial, when the jury hung, but if his testimony had been looked at by the jury in a logical way, it in no wise helps plaintiff, because, if his testimony is correct, then the boy tried to go between the tender and the engine, out of sight, no doubt, of Lane, and all the train crew; tried to cross over a place where nobody could see him, nobody was bound to see him; nobody was bound to look at him, I should say, or look for him.

[fol. 184] Of course, inferences are to be drawn from the testimony of many of plaintiff's witnesses, which produce the inevitable conviction that they did not know what they were talking about; witnesses who contended—some few of them—that the train was going ten miles an hour, yet testified that somebody crawled between two box cars, while the train was moving, and thus got from the east side to the west side, where the boy was hurt, in order to aid him. That may have happened, but to me it is wholly improbable. The

witness who testified that it took him ten minutes to get from a certain place down to the train, evidently was badly mistaken. So, the evidence is shot through with contradictions and inconsistencies.

The order will be that the motion for new trial will be sustained unless, within ten days, plaintiff shall enter a remittitur of fifteen thousand dollars, thus getting the judgment down to twenty-eight thousand dollars, in which event the motion will be overruled.

RECITAL RE REMITTITUR

And thereafter, to-wit, on the tenth day of December, 1929, plaintiff in open court voluntarily remits the sum of fifteen thousand dollars to defendant, from assessment of damages in his favor by jury on trial of cause, thereby reducing the amount of judgment herein to the sum of twenty-eight thousand dollars; whereupon defendant's motion for new trial is overruled.

To which action and decision of the Court in overruling and denying defendant's said motion for a new trial and in refusing to set aside the verdict and judgment herein and to grant unto the defendant a new trial, as so requested and prayed by it, defendant, by its counsel, then and there excepted and still continues to except, for the reason that after finding the facts found by the Court in its decision aforesaid, it then and there became and was the duty of the Court under such facts so found by it, in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judgment herein and to grant unto the defendant a new trial; and for the reason that under such facts so found by the Court in its decision aforesaid, the Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the Court in refusing and denying defendant's said motion for a new trial was arbitrary [fols. 185 & 186] and constituted and was an abuse of sound judicial discretion by the Court.

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE AND COUNSEL

Forasmuch, as said matters do not appear of record herein the defendant has prepared, and now presents, its Bill of Exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 4th day of February 1930.

C. B. Faris, Judge Eastern Division of the Eastern Judicial District of Missouri.

Approved by:

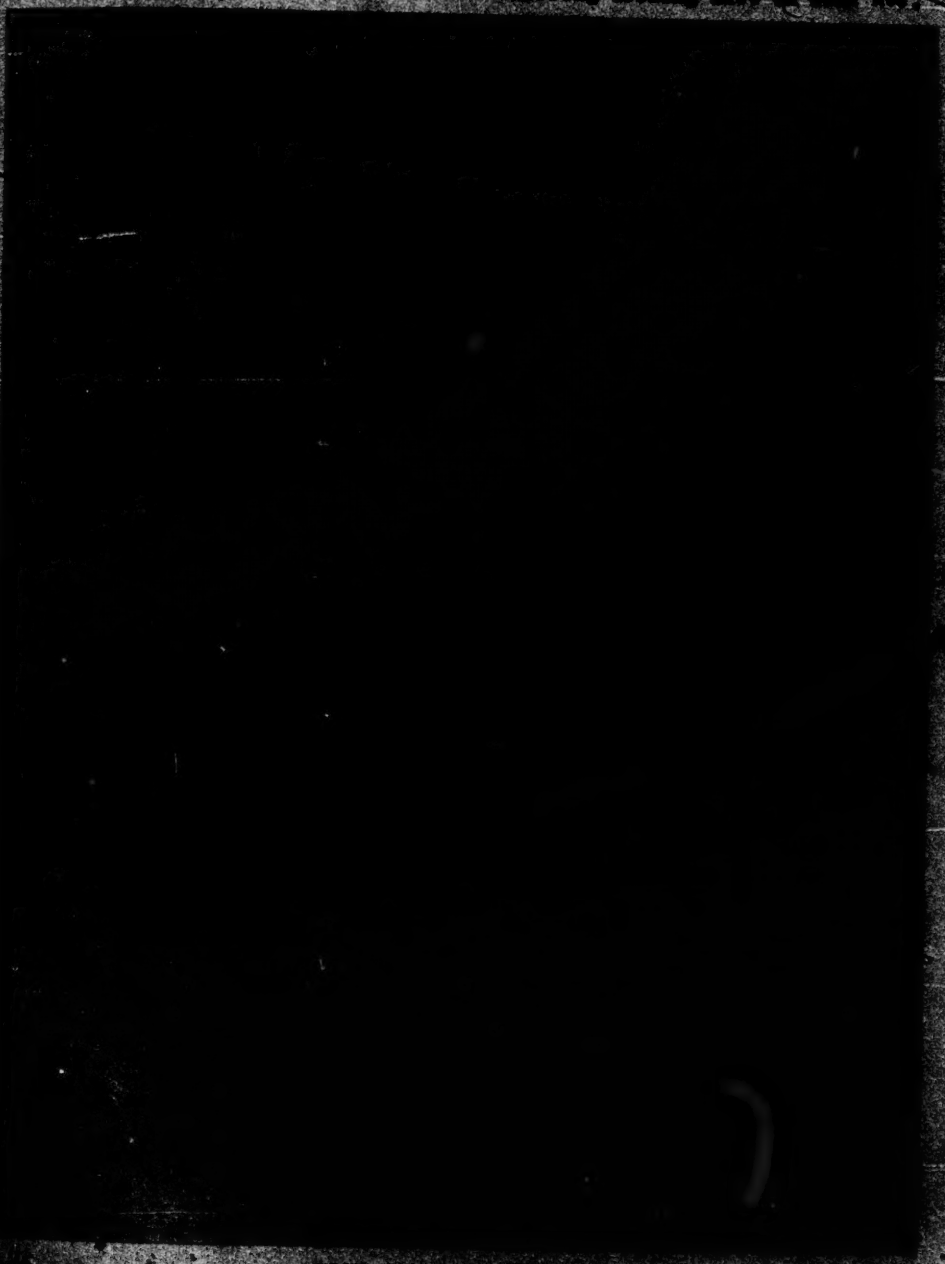
Louis E. Miller, Counsel for Plaintiff. Kramer, Kramer & Campbell, R. E. Costello, Sam'l B. McPheeters, Counsel for Deft.

(Here follow Plaintiff's Exhibits B and D, side folios 187-190; also Defendant's Exhibits 1, 2, 3, 4, 6, and 7, side folios 191-202)

Looking west on Bond Ave. from east side of Van Ness Ave.

Southern R.R. 00's. Steps at 6th and Bond Ave.

On the back of reverse side of Schedule 1 appears the following:
Picture taken Wednesday, [illegible] 6th, 1942, by [illegible]
Camera placed 75 feet West of the Northern landing base on [illegible]

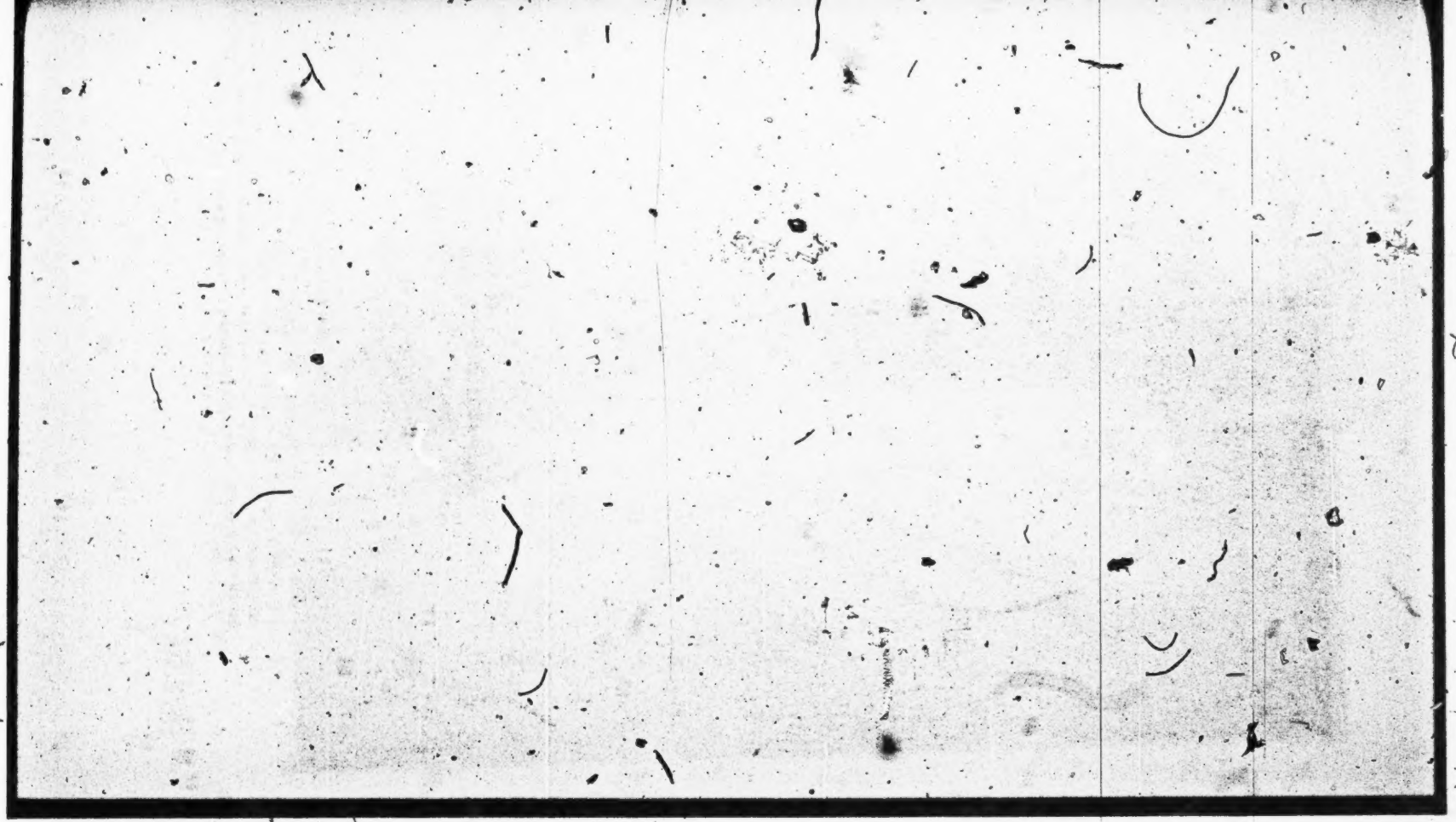


193-194

On the back or reverse side of Defendant's Exhibit 2 appears the following:

Picture taken Wednesday March 9th, 1927. By F. Crawford
Camera placed 50 feet North of the crossing looking South on the tracks

DEFENDANT'S EXHIBIT 2

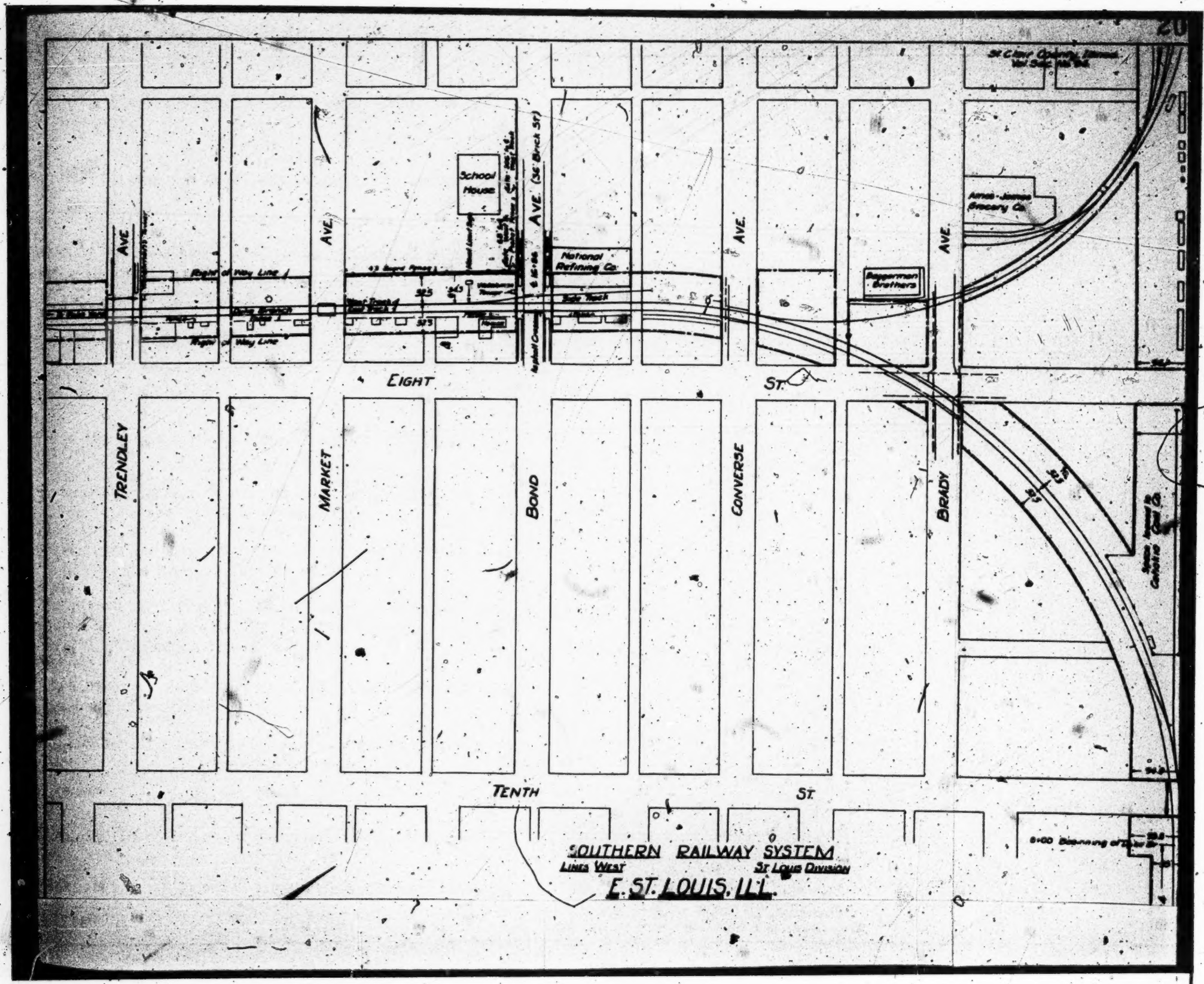


On the back or reverse side of Defendant's Exhibit 3 appears the following:
Picture taken Wednesday March 9th, 1927. By F. Crawford
Camera placed 75 feet East of the crossing looking West on Bond Ave,

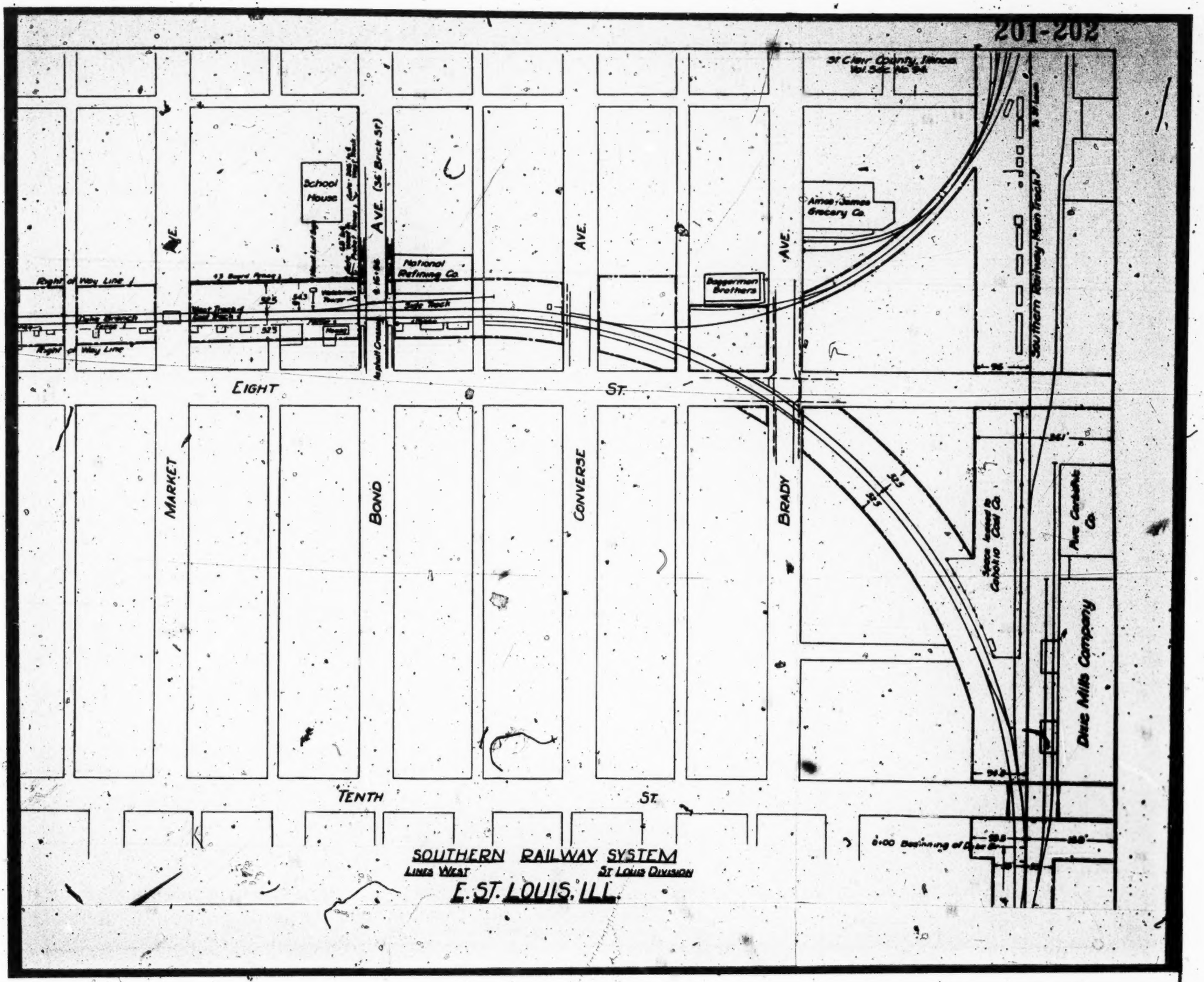
DEFENDANT'S EXHIBIT 3.

On the back or reverse side of Defendant's Exhibit 4 appears the following:
Picture taken Wednesday March 9th, 1927. By F. Crawford
Camera placed 50 feet South of the crossing looking
North on the tracks.

DEFENDANT'S EXHIBIT 4


School House
AVE.
AVE.
AVE. (36' Brick St)
AVE.
AVE.
National Refining Co.
Peppermann Brothers
Right of Way Line
Right of Way Line
EIGHT
ST.
TRENDLEY
MARKET
BOND
CONVERSE
BRADY
TENTH
ST.
SOUTHERN RAILWAY SYSTEM
LINES WEST
ST LOUIS DIVISION
E. ST. LOUIS, ILL.

201-202


St Clair County, Illinois
Vol. Sec. No. 94
School House
AVE. (36' Brick St)
AVE.
AVE.
AVE.
National Refining Co.
Baggerman Brothers
Amer. James Grocery Co.
Southern Railway, Main Track
Right of Way Line
Right of Way Line
Side Track
EIGHT ST.
MARKET
BOND
CONVERSE
BRADY
TENTH ST.
Illinois Terminal R. R. Co.
Pure Carbonic Co.
Dixie Mills Company
SOUTHERN RAILWAY SYSTEM
LINES WEST
ST LOUIS DIVISION
E. ST. LOUIS, ILL.

[fol. 203] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 204] Appearances of counsel omitted in printing.

[fol. 205] Minute entry of argument and submission, November 19, 1930, omitted in printing.

[fol. 206] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, NOVEMBER TERM, A. D. 1930

No. 8879

SOUTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend, Appellee

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. Bruce A. Campbell (Mr. Edward C. Kramer, Mr. Rudolph J. Kramer, Mr. R. Emmett Costello and Mr. Samuel B. McPheeters were with him on the brief) for appellant.

Mr. Charles A. Lich (Mr. Louis E. Miller was with him on the brief) for appellee.

Before Stone and Gardner, Circuit Judges, and Wyman, District Judge

OPINION—Filed Feb. 14, 1931

GARDNER, Circuit Judge, delivered the opinion of the court.

This is an action in which the appellee, a minor, brought suit against the appellant to recover damages for personal injuries. The parties will be referred to as they appeared in the lower court.

At the time of receiving his injuries, the plaintiff was a boy about six years old, attending the public schools in [fol. 207] East St. Louis, Illinois. The school house at which he was attending was located on the south side of what is referred to as Bond Avenue, a street running east and west. At a point about one hundred feet east of the school house Bond Avenue is intersected at right angles by two tracks of the defendant company, passing north and south. It was alleged in plaintiff's petition that on the 3rd day of March, 1927, he was walking from the school house in an easterly direction across the tracks of the defendant company where they cross Bond Avenue, and that while so doing the defendant ran a north bound train over and along its tracks and across Bond Avenue, striking him as he was in the act of crossing these tracks, and so injuring him that it was necessary to amputate his right leg and part of his left foot. It was alleged that these injuries resulted from the carelessness of the defendant in that it ran and operated its train on the tracks across Bond Avenue at the time in question without sounding any warning bell or signal of the approach of the train, and that it ran and operated its train over said tracks at this crossing without coming to a stop and flagging the crossing as required by an order entered by the Illinois Commerce Commission requiring it to protect this crossing by stopping all trains before passing over it, and requiring one of the crew of the train to flag the crossing and warn all persons attempting to cross the crossing of the approach of the train. There were other allegations of negligence, but in view of the instructions of the court they are not material. The answer was a general denial.

At the close of all the evidence, the defendant interposed a motion for a directed verdict, which the court overruled, and the jury returned a verdict in favor of the plaintiff for $43,000. On motion for a new trial the court held this verdict excessive and announced that the motion for new trial would be sustained unless within ten days the plaintiff should enter a remittitur of $15,000. The plaintiff elected to remit the $15,000, and thereupon judgment was entered for $28,000, and the motion for new trial was overruled.

On this appeal it is urged: (1) that the court erred in denying defendant's motion for a directed verdict interposed

at the close of all the testimony; (2) that the court erred in not granting its motion for a new trial; (3) that the verdict, even after remittitur, was excessive; and (4) that the court erred in certain rulings as to the admissibility of evidence. [fol. 208] The court, in its charge to the jury, withdrew from the consideration of the jury, all the allegations of negligence charged in the petition, except the allegation with reference to the order of the Illinois Commerce Commission under date of August 20, 1926, requiring trains, upon passing over this crossing, to come to a stop, and requiring one of the crew to flag the crossing and to warn all persons attempting to cross of the approach of the train.

Accepting the defendant's request for a directed verdict as a sufficient challenge to the sufficiency of the evidence, the question presented to the court on appeal is whether or not there was substantial evidence to sustain the verdict. Atchison, T. & S. F. Ry. Co. v. Condos, 30 Fed. (2d) 669; Flannery v. Willcuts, 25 Fed. (2d) 951; Concordia Fire Ins. Co. v. Commercial Bank, 39 Fed. (2d) 826; Hardy-Burlingham Mining Co. v. Baker, 10 Fed. (2d) 277; Security Life Ins. Co. v. Brimmer, 36 Fed. (2d) 176; Michigan Central R. R. Co. v. Mix, 278 U. S. 492; Slocum v. New York Life Ins. Co., 228 U. S. 364.

In its instructions, which are not excepted to by the appellant, the court advised the jury that,

"If the defendant stopped that train, and flagged it across, you ought to find for defendant. If defendant did not stop it and flag it across, you ought to find for the plaintiff. You cannot, of course, find for plaintiff unless defendant was guilty of that act of negligence. Whatever else it may have omitted to do, or whatever else it may have done, would not warrant you in finding for plaintiff. You can only find for plaintiff if you find that defendant was guilty of the single act of negligence that I have called your attention to. If it was, then, I repeat, you ought to find for plaintiff; if it was not, you ought to find for defendant."

In other portions of the instructions the court told the jury in effect that the order made by the Illinois Commerce Commission, required the stopping of the train and the flagging of this crossing, and specifically told the jury that

the question of the compliance with this order by the defendant was decisive of the case, saying:

"Did it comply? If it did, find for the defendant; if it did not, find for the plaintiff."

[fol. 209] It is observed that the court by these instructions took from the jury all allegations of negligence with reference to the speed of the train and the alleged failure to blow a whistle, and, on the other hand, in effect told the jury that the plaintiff had in fact been struck by the train and injured at this crossing; thus limiting the issue to a single question. It will, therefore, serve no useful purpose to review the evidence which tends to prove that the plaintiff was struck and injured by this train.

It appears from substantial evidence, that the accident occurred about three o'clock P. M. on March 3, 1927. The plaintiff, with four other boys, started to cross the tracks of the defendant at this crossing. The other four boys ran across the track ahead of the engine without mishap, but the plaintiff, in attempting to pass in front of the engine, was struck by some part of it and seriously injured.

Going directly to the evidence on the issue submitted to the jury, we need refer, of course, only to the testimony produced by the plaintiff, or that tended to sustain the verdict, and we must assume, in view of the verdict, that it was believed by the jury. We are not here concerned with the question of the credibility of the witnesses, nor the weight of the testimony.

John Luscomb, the engineer in charge of the train, testified that it would require from three to five minutes running time in order to build up a speed of from five to six miles an hour from a dead stop. The witness John McKenzie testified that he was driving his automobile and tried to go up several streets but was cut off by this train, and that the train was moving and he tried to get around it; that Tenth Street runs right off of the Free Bridge, across which he came, practically parallel with the defendant's tracks, and that as he left the bridge he drove north on Tenth Street; that there were three or four streets running east and west from Tenth Street at that place crossing defendant's tracks, and that he intended to turn west down the first street, but observed this train moving north; that

upon reaching the next street he still observed the train moving north; passing to the next street he looked west and observed the train moving, and when he reached the next street, which was Bond Avenue, he turned west into that street and observed the hind end of the engine as it was just crossing Bond Avenue; that as he drove up on Bond [fol. 210] Avenue to the train, a distance of less than two blocks, he saw the plaintiff lying in the street on the opposite side of the train; that when he arrived about ten or fifteen cars had passed over the intersection, and the train was moving at a rate of fifteen miles an hour. He testified that the train was moving at all times after he first observed it when he attempted to turn west at the first street after leaving Free Bridge, and that it never stopped at any time after he first observed it until it had passed over the Bond Avenue crossing; that when he first turned west onto Bond Avenue the hind end of the engine had just crossed that street.

The witness Thomas Heher testified that he had stopped at a filling station near this crossing; that his attention was attracted by the scream of a woman and that he saw this boy under the train; that he was familiar with the speed of moving vehicles and that he estimated the speed of the train at that time at ten miles an hour. The witness Benjamin F. Ward, who was operating a filling station about seventy-five feet from where the accident occurred, testified that upon hearing the scream of a woman, he looked in that direction and observed that the engine and one or two cars had passed over the crossing, and that the train was moving at a rate of between twelve and fifteen miles an hour; that he did not observe the train stop at anytime, and that the injured boy was lying near the west side of the track, about six and a half feet from the sidewalk on Bond Avenue.

The plaintiff testified that he had been going to this school for about two or three weeks before the accident; that he lived east of the railroad tracks and that in going to and from school he had to cross over the railroad track; that at the time of his injury he and some other boys were going home from school and that the other boys were running but he was walking, and that he did not see the train before he started across the tracks; that when he first saw the train it was about half a block away.

Corda Pettit testified that she and Mrs. Odell drove up on Tenth Street and were stopped by the train on this crossing and that looking under the car they saw the plaintiff; that they were driving west on Bond Avenue while the train was moving north across the Avenue; that she did not observe the train stop nor hear the sound of a whistle. [fol. 211] She was asked on cross-examination with reference to the train stopping:

"Q. Do you know whether it stopped at Bond Avenue, or not?

A. I am sure it did not.

Q. I am not asking you that. Do you know whether it did or not?

A. I am sure it didn't."

Being asked upon cross-examination why she testified that the train did not stop, she said:

"Well, it seemed like I would have noticed it halting there, if it had."

Mrs. Odell, who was with Mrs. Pettit in the car, testified to the incident of being stopped on this crossing and seeing the little boy lying in the street with his limb cut off; that as she approached the crossing she observed the train coming, moving north. She testified as follows:

"Q. Where were you when you observed the train coming?

A. I was almost to Eighth Street, on Bond Avenue.

Q. At that time were you able to observe the engine of that train?

A. Yes, sir.

Q. Which direction was it moving in?

A. It was going north.

Q. And as it crossed Bond Avenue, going north, can you state whether or not there were any cars attached to it?

A. Yes, sir; lots of them.

Q. Now, when you observed this train and this engine with the string of cars attached, going north across Bond Avenue, what did you do then?

A. I stopped.

. . . . . .

Q. As you approached this railroad crossing, I will ask you whether or not you saw any men on any part of the engine or tender.

A. I never did.

Q. After the cars had passed over, what did you do?

A. As soon as I—almost as soon as I stopped, possibly a second or two afterwards, I noticed a child, and I jumped out and ran to him, and then I ran back and called an ambulance."

On cross-examination, she testified:

[fol. 212] "Q. Yes, before you ever saw the boy.

A. Before I saw the child the engine and possibly two or three cars had passed over. When I first saw the train it was about seventy-five or a hundred feet from the crossing.

Q. When you say 'from the crossing,' which direction was it from the crossing?

A. It was south from the crossing, going north.

Q. It had not reached Bond Avenue?

A. No, it had not. It was about seventy-five or a hundred feet.

Q. South of Bond Avenue when you first saw it?

A. Yes, sir.

Q. Did you see the boy at that time?

A. No, sir, I never. I was not looking in that direction. I was looking toward the train."

James Goodwin testified that he was leaning against a post and saw four boys start across the tracks, all of whom were running except the plaintiff, and that as plaintiff was crossing the track the train hit him and threw him back; that he heard no bell or whistle sounded; that the three boys who ran, got across the track ahead of the train. Ruth Sheeley testified that she saw some boys who had just gotten out of school, coming along Bond Avenue; that the train was coming and that about three or four of the boys got across the track, but that the plaintiff did not; that he was hit by the engine and knocked on the track, and a man came along and picked him up and dragged him out from under the train.

There was a great deal of other testimony, both as to the accident and as to the surrounding facts and circum-

stances. The testimony as to the failure to stop the train and flag the crossing was, it is true, directly in conflict with that produced by the defendant. The defendant's engineer testified that it would require from three to five minutes running time in order to build up a speed of five or six miles an hour from a dead stop, under the conditions as they prevailed at the place of this accident. The evidence of the plaintiff showed that as the engine crossed this crossing, or immediately thereafter, it was going at a speed of from ten to fifteen miles an hour. This was a circumstance surely tending to prove that the train had not stopped at this crossing, and there was direct testimony to the effect that it had not stopped. The testimony of the defendant to the effect that two men were standing on the footboards of the engine and that the train stopped and [fol. 213] one of these men flagged the crossing, need not have been believed by the jury, especially in view of the fact that neither of these men seem to have seen any of these little boys, and the physical fact shows that this boy was struck by this train at this crossing. Where the evidence is of such a character that reasonable men may reach different conclusions, the case should be submitted to the jury. Mutual Life Ins. Co. v. Hatten, 17 Fed. (2d) 889; Crookston Lbr. Co. v. Boutin, 149 Fed. 680; United States Can Co. v. Ryan, 39 Fed. (2d) 445; Gunning v. Cooley, 281 U. S. 90.

In Gunning v. Cooley, supra, the Supreme Court said:

"And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

We are of the view that there was substantial evidence to sustain the verdict.

It is seriously urged that the court erred in denying defendant's motion for a new trial. This court has often held that a motion for a new trial on the ground that the verdict is not sustained by the evidence is addressed to the discretion of the trial court, and its ruling thereon will not be reviewed on appeal. Yellow Cab Co. v. Earle, 275 Fed.

928; Chicago, M. & St. P. Ry. Co. v. Heil, 154 Fed. 626; Southern Surety Co. v. United States, 23 Fed. (2d) 55; Cudahy Packing Co. v. City of Omaha, 24 Fed. (2d) 3; Chicago, B. & O. R. Co. v. Conway, 29 Fed. (2d) 551. This is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, but it appears from the record that after very careful and thoughtful consideration of the motion the court denied the same. Neither will this court review the question of the amount of the verdict. United States Can Co. v. Ryan, 39 Fed. (2d) 445; Sun Oil Co. v. Rhodes, 15 Fed. (2d) 790; Public Utilities Corp. of Arkansas v. McNaughton, 39 Fed. (2d) 7; Detroit Taxicab & Transfer Co. v. Pratt, 2 Fed. (2d) 193; Lincoln v. Power, 151 U. S. 436; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60.

It is urged in the assignments of error that the court erred in certain rulings on evidence. We have examined these rulings, and the questions raised are so trivial as not [fol. 214] to warrant review. If any errors were committed in the rulings questioned, they were certainly not prejudicial. They were not presented on oral argument, and no authorities are cited in the brief in support of the contention of counsel and we must assume that none exist. The record indicates that the lower court vigilantly protected the rights of the defendant in the trial of this action and that no errors were committed to its prejudice. The judgment is, therefore, affirmed.

[fol. 215] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 8879

SOUTHERN RAILWAY COMPANY, a Corporation, Appellant,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend

Appeal from the District Court of the United States for the Eastern District of Missouri

JUDGMENT—February 14, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that Edward Walters, a Minor, by Herman Walters, his Father and Next Friend, have and recover against the Southern Railway Company, a Corporation, the sum of Twenty Dollars for his costs herein and have execution therefor.

[fols. 216-230] Petition for rehearing, covering 15 pages, filed March 10, 1931, omitted from this print. It was denied, and nothing more by order March 18, 1931.

[fol. 231] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—March 18, 1931

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On Consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 232] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION FOR STAY OF ISSUANCE OF MANDATE—Filed Mar. 26, 1931

Now comes Southern Railway Company, a corporation, appellant in above entitled cause, by Rudolph J. Kramer, Bruce A. Campbell, R. Emmett Costello and Samuel B. McPheeters, its attorneys, and respectfully prays that an order be entered by this Court in the above entitled cause, staying the issue of the mandate in said cause until and including the 27th day of April, A. D. 1931, and thereafter until final disposition of said cause by the Supreme Court of the United States in case on or before the said 27th day of April, A. D. 1931, there shall be filed with the Clerk of this Court the certificate of the Clerk of said Supreme Court, as provided by Rule 32 of this Court. And in support of this

motion the said appellant represents unto the Court as follows:

1. That on or about the 14th day of February, A. D. 1931, an order and judgment was entered by this Court, affirming the judgment in said cause of the District Court of the United States for the Eastern District of Missouri.

2. That thereafter and within the time and in the manner prescribed by the rules of this Court, this appellant filed its petition for a rehearing in said cause.

3. That afterwards, on the 18th day of March, A. D. 1931, an order and judgment was entered by this Court, overruling and denying appellant's petition for a rehearing in this cause.

4. That under the rules of this Court the mandate in said cause will issue on the 28th day of March, A. D. 1931, being ten (10) days after the denial of said petition for rehearing.

5. That appellant intends to file in the Supreme Court of the United States a petition for certiorari in this cause, as [fol. 233] provided by the statutes of the United States in such cases made and provided, and in accordance with the rules of said Supreme Court of the United States, and that appellant intends to file said petition for certiorari in good faith and in accordance with the statute and the rules of said Supreme Court hereinbefore mentioned.

6. That the judgment in this case is for the sum of Twenty-eight Thousand Dollars ($28,000.00). That on the 4th day of February, A. D. 1930, when the appeal in this cause was allowed, appellant filed its bond in the penal sum of Thirty Thousand Dollars ($30,000.00), with the United States Fidelity and Guaranty Company as surety, conditioned that if the said appellant should perfect its appeal to effect and answer all damages and costs if it failed to make its said plea good, then the obligation should be null and void, otherwise to remain in full force and effect; which said appeal bond was approved by the Judge of the District Court of the United States for the Eastern District of Missouri on the same date that it was filed, and which said bond is still in full force and effect.

7. That in the opinion of appellant and its counsel said bond already in force and effect is sufficient fully to protect the interests of appellee in said cause during the period of said stay order, or any extension thereof, as provided by the rules of this Court.

8. That the thirty (30) days provided by the rules of this Court after the ten (10) days after the denial of the petition for rehearing will expire on April 27th, A. D. 1931.

Wherefore, this appellant prays, as above set forth, that the issue of the mandate of this Court in said cause be stayed until and including the 27th day of April, A. D. 1931, [fol. 234] and thereafter until the final disposition of said cause by the Supreme Court, as provided by Rule 32 of this Court, provided the certificate of the Clerk of the Supreme Court is filed in the office of the Clerk of this Court on or before April 27th, A. D. 1931, in the manner and form and as prescribed by said Rule 32 of this honorable Court.

All of which is respectfully asked and prayed.

Southern Railway Company, by Rudolph J. Kramer, Bruce C. Campbell, R. Emmett Costello, Saml. B. McPheeters, Its Attorneys.

Duly sworn to by Samuel B. McPheeters. Jurat omitted in printing.

[fol. 235] [File endorsement omitted]

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—March 31, 1931

On Consideration of the motion of appellant, supported by affidavit, for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein, be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed and proof by affidavit of notice thereof under Paragraph 3 of

Rule 38 of the Supreme Court be given, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

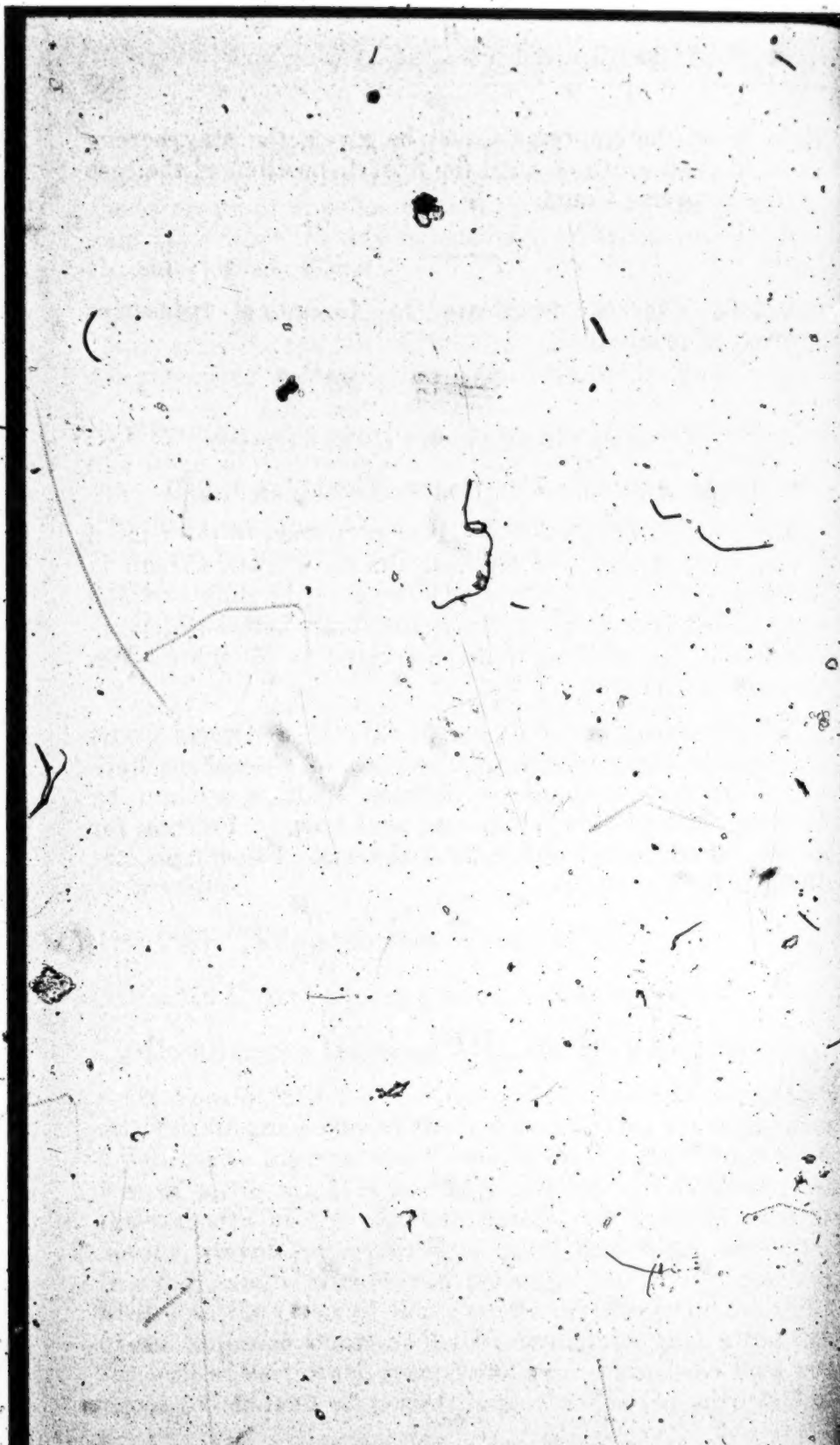
[fol. 236] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 237] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 4, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,821. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 52. Southern Railway Company, petitioner, vs. Edward Walters, a minor, by Herman Walters, his father and next friend. Petition for a writ of certiorari and exhibit thereto. Filed April 20, 1931. File No. 35,821.



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CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 52

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. O'B. COOPER,
RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Counsel for Petitioner.

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St. Louis Law Printing Co., 415 North Eighth Street. ' CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .....

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Southern Railway Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This cause was filed to the February Term, 1929, of the St. Louis Circuit Court, to recover $65,000 damages on account of injury sustained by respondent, aged 6 at the time, in an alleged crossing accident at the intersection of Bond avenue and petitioner's Dyke yard tracks in East

St. Louis, Illinois, on March 3, 1927 (R. 4). After the removal to the United States District Court (R. 7) respondent, on April 24, 1929, filed an amended petition (R. 12). Inasmuch as the Court in its charge to the jury withdrew from the consideration of the jury all of the allegations of negligence charged in the petition except one (R. 165, 166, 167 and 168), the only material allegation of the petition necessary to be considered here is the alleged violation of an order of the Illinois Commerce Commission, dated October 20, 1926, which order required trains of the petitioner, upon passing over said crossing, to come to a stop and required one of the crew to flag said crossing and to warn all persons attempting to cross said crossing of the approach of said train (R. 12). The amended petition alleged a negligent violation of this order and that respondent was injured as the proximate result thereof. Petitioner's amended answer was a general denial (R. 27).

At the first trial of the cause in the United States District Court the jury failed to agree (R. 180). At the second trial in the District Court in November, 1929, a jury verdict was rendered in favor of respondent for $43,000 (R. 178). Written motion for a new trial was filed by petitioner on November 16, 1929 (R. 180). The motion was argued and submitted December 2, 1929 (R. 180), and overruled December 10, 1929, after a remittitur of $15,000, made by direction of the Court, had been

entered, thereby reducing the judgment to $28,000 (R. 184).

The case had previously been tried once in the United States District Court at East St. Louis, Illinois, resulting in respondent taking a nonsuit after the Court had intimated that it would direct a verdict (R. 180).

Petitioner duly prayed for and was allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The appeal was heard in that court and resulted in an affirmance of the judgment of the trial court on February 14, 1931 (R. 212; opinion of Court of Appeals, R. 205 to 212). Petitioner filed its petition for rehearing (R. 215), which was denied on March 18, 1931 (R. 231).

The accident in question happened about 2:50 p. m. on March 3, 1927. Bond avenue runs east and west and the double-track railroad of petitioner runs north and south. Pictures in evidence (R. 188, 190, 191, 193, 195, 197) and the plat (R. 201) show the physical conditions at and near the place of the accident. Bond avenue is a public street, paved with brick, is thirty-six feet from curb to curb of the brick pavement, and has on each side a concrete sidewalk six feet wide. The Franklin public school is located on Bond avenue west of the tracks and south of Bond avenue.

Respondent was a pupil at the Franklin School and claims to have been going home from school and that, while crossing the railroad tracks on Bond avenue from

west to east, he was hit by the engine. The injury consisted of the loss of one leg and damage to the toes of the other foot.

To recover it was necessary for respondent to prove the following facts:

a. That he was on Bond avenue at the time of his injury, and that he was crossing, or attempting to cross, Bond avenue at the time.

b. That he was hit by the front end of the engine, considering the front end as the forward part of the engine the way the train was moving at the time.

c. That petitioner's servants violated the order of the Commission and did not before passing over Bond avenue come to a stop and require one of the crew to flag the crossing and warn all persons attempting to cross the crossing of the approach of the train.

d. That such failure of the crew, if they did so fail, was the direct and proximate cause of respondent receiving the injury.

The engine in question was pulling fifty cars, and while at the head end of the train, was pulling the cut of cars with the tender in front.

Upon the question raised by petitioner that a verdict should have been directed in its favor, it is necessary, briefly, to review the evidence adduced:

Mrs. Corda Pettit testified (R. 29) on direct examination that she did not observe the train stop. She was traveling north on Tenth street, which is about two blocks

east of and parallel with the tracks, and turned west on Bond avenue. When she first saw the train it was going across Bond avenue (R. 28) and the engine had crossed Bond avenue and (R. 31) the engine and first cars were over Bond avenue before she ever saw it. The Court then interrogated the witness (R. 32), and from her answers it is apparent that she did not know and could not know whether the train stopped before it crossed Bond avenue because she did not see the train until after it had crossed Bond avenue. She did not see the boy until after the accident.

Mrs. Edith O'Dell did not see the boy until the train had crossed Bond avenue (R. 36). She negatively testified (R. 40) that she did not see any men on any portion of the engine.

Thomas Heher was in a filling station at Eighth and Bond avenue, half a block away. He heard a lady scream and went to the scene of the accident and saw respondent under the train (R. 45). When he got to the scene of the accident, more than half a block away, only the engine and six cars had crossed the street. He does not testify at all as to whether the train stopped or as to what part of the engine hit the boy. He had seen the train before he went to the filling station, when it was half a block south of Bond avenue, at which time he was going east to the filling station (R. 53). He testified (R. 52) that it took the train ten minutes to go from half a block south of Bond avenue to six car lengths north of Bond avenue, which was where

it was when he got to the railroad track (R. 53). His testimony as to speed of fifteen miles an hour was rejected by the trial judge, first, in refusing to let the case go to the jury on the question of speed, and, second, in commenting upon the witnesses' testimony (R. 184).

John McKenzie was traveling north on Tenth street, more than two full blocks east of the railroad tracks. He says he intended to pass in front of the train; he looked down one street and saw the train moving; he looked down another street, which was Bond avenue, and saw the train moving (R. 60). In between the street intersections he was not able to see the train. He does not know what happened while he was between the different street intersections, and he positively says that he did not know whether the train stopped while he was between the intersections or not, as he could not see what it did then (R. 62). When he got to Bond avenue and turned west the rear end of the engine was just passing over Bond avenue and was right in front of him (R. 64). He was then 700 feet from the railroad tracks. He did not testify, as stated in the opinion of the Court of Appeals, that the train was traveling at a speed of fifteen miles an hour; instead, he testified (R. 64) that his automobile was traveling at the rate of fifteen miles an hour in going the 700 feet from Tenth street to the tracks, and that only six or seven cars passed over Bond avenue while he was traveling this distance of 700 feet. A car is forty to fifty feet in length; therefore, the train moved from 240 to 350 feet while he was traveling

700 feet, and he was traveling at a rate of speed of fifteen miles per hour. Judge Faris rejected this evidence (R. 184).

Ruth Schiele was a pupil at the Franklin School and was eleven years old. With reference to her testimony the trial judge said (R. 180):

> "'She says she was looking out of the window on the landing and saw appellee and the other three boys in front of the train and saw appellee struck.'"

She testified that respondent was hit by the train—by the engine (R. 69). She does not say what part of the engine the boy was hit by. She was in the school yard, and she could not see on account of the board fence, unless there was an opening in it. She testified that she saw through a gate which was in the board fence on Bond avenue, and that if this gate was closed she could not see the crossing (R. 72); that the board fence was about a foot higher than her head and that she could not see over the board fence, and that the only place that she could see would be through an opening in the board fence, and that if there was not a gate through which she could see that she couldn't see anything (R. 78-79). She finally identified the gate she saw through as on Bond avenue and thirteen feet from the fence which runs parallel with the track. The map (R. 201), Exhibit 3 (R. 195), the testimony of Guthrie, the engineer (R. 156-160) and the un-

disputed testimony shows that there is no gate there and that the only gate is from the schoolhouse to Bond avenue and at a place where, even if it was open, nothing could be seen through it from where she was. To see through the only gate there she would have had to have looked directly north the length of the concrete walk and thence west to Bond avenue. She does say that the train did not make any stop (R. 74). She is the only witness who testified that it did not stop, but under the physical circumstances she could not know whether it did or not, because she could not see it.

James Goodwin was eleven at the time of the trial. The trial judge reviews his testimony (R. 181) and says that it is the only reasonable testimony offered by respondent and that it corroborates in every respect the testimony of the train crew. Goodwin does not know whether the train backed up or not, but testified that there was a car in front of the engine and that the part of the train that struck respondent was the back part of the engine, and that the car ahead of the engine had already gone over the crossing before the boy was struck (R. 91). Further, that the box car (R. 92) got by respondent before he was hit, and he testified positively (R. 92) that the boy was hit by the part of the engine that was in the back. He evidently mistook the tender for a car, but he positively testified that the boy was hit by the back part of the engine. He did not testify as to whether or not the train stopped.

Respondent was six years old at the time of the accident

and had only been going to school two or three weeks before the accident. He knew that trains ran on the tracks (R. 94, 97, 98). He testified that he was walking across the tracks on the south side; that he saw the train when it was half a block away and when he was in the middle of the track (R. 98); that the train was coming from the north, and that the engine was across Bond avenue when the front part of the engine struck him. He further testified that the front end of the train that truck him was the part with the headlight on it, and that it was up in front (R. 101), and that there was a cowcatcher on the end that hit him (R. 104), and that cowcatcher was on the front part of the train, and that was the part of the train that struck him. He testified on direct examination that he did not see the train until it hit him, but afterwards corrected this by saying he saw it one-half block away. At different times he had the train going north and south. He testified nothing in regard to whether or not the train stopped.

B. F. Ward (R. 101) was operating the filling station where Heher was filling his car. He knew nothing about the accident until he heard a scream and he looked over and saw appellee under a car, and at that time two cars and the engine had passed. He knew nothing about where the boy was hit or whether or not the train stopped.

Five witnesses for petitioner testified positively that the train did stop before crossing Bond avenue, and that Lane, the switchman riding on the front footboard, flagged the

crossing before the train went over Bond avenue, and that no boy was hit by the front end of the engine. These witnesses are Lane (R. 122), Knight (R. 128), Luscomb (R. 133), Stewart (R. 139) and Woodside (R. 143).

On cross-examination the engineer, Luscomb (R. 142), was asked as to what distance it would require to get up a speed of from twelve to fifteen miles an hour. He declined to answer this question, and then he was asked what distance it would take to get up a speed of six miles an hour under those conditions, and he answered that he did not know. Then the following occurred:

> "Q. Have you not during that period of time been able to form any approximate estimate of what distance it would take you under those circumstances? Just give us your best judgment; you do not have to be exact?
>
> A. Well, maybe three to five minutes.
>
> Q. That is, to get up to six miles an hour?
>
> A. Yes, sir."

Summarizing the testimony on the question of whether or not the train stopped, there are three witnesses who pretend to testify on that subject: Mrs. Pettit, who could not even see the train until the engine and two or three cars had passed over Bond avenue; McKenzie, who was two blocks away and had to look down street intersections, and who testified that he did not know what happened when he was between intersections, and Ruth Schiele, who could not possibly see from where she was.

On the question of what part of the engine hit respondent, there are only three witnesses who pretend even to know anything about it: Ruth Schiele, who says he was hit by the engine without saying what part of the engine, and who the undisputed evidence shows could not see the engine; Goodwin, who says he was hit by the front part of the engine after the car in front had passed, which would be the end of the engine that is next to the car and, in fact, the back end of the engine, and Edward Walters, who says that he was hit by the front part of the engine, which he says was the end that had the headlight and cow-catcher on it, and which would be the back part of the engine the way the train was moving, and who also testified that while he was on the south side of Bond avenue the engine had crossed Bond avenue when the front part of the engine struck him.

Petitioner, at the close of respondent's evidence and at the close of all the evidence (R. 118 and 164), presented to the Court and requested the Court to give to the jury an instruction in the nature of a demurrer to the evidence. In each instance the Court refused to grant the motion and refused to give the offered instruction, and due exceptions were taken. After the verdict was rendered petitioner filed its written motion for a new trial (R. 179-180). The Court's decision on the motion for new trial is set forth in full in the record (R. 180 to 184, both inclusive), and is a part of the bill of exceptions in the case.

At the time that the Court rendered its decision on the motion for new trial, petitioner excepted to the action of the Court in denying the motion on the ground that after finding the facts found by the Court in its decision on the motion for new trial, it then and there became and was the duty of the Court, under the facts so found by it in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judgment in the case and to grant unto petitioner a new trial, and for the further reason that under such facts, so found by the Court in its decision the Court failed to exercise a sound judicial discretion in refusing and denying the motion for a new trial, and for the further reason that the action of the Court in refusing and denying appellant's motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion (R. 184).

The Court, in passing on the motion for a new trial, found that witnesses for respondent were most woefully lacking in accuracy of observation; that logically they crossed one another; that no two of them told the same story or gave the same version of the occurrence (R. 180). The Court further found that Ruth Schiele (R. 180-181) could not possibly have seen the accident from the point at which she stood, and calls attention to the fact that she foresaw that contingency and attempted to get around it by claiming to have seen through a gate, but the Court finds there was no gate there for her to see through (R.

181). The Court then found that there were abysmal contradictions, logically considered, in the evidence of respondent's witnesses; that no two of them saw things alike or came within a thousand yards of seeing them alike (R. 181).

The Court then considered the testimony of James Goodwin (R. 181-183) and stated (R. 181) that, while he had no right to make a finding about the matter, yet he was of the view that the testimony of James Goodwin came nearer approximating the truth than that of any other witnesses for respondent; that he stated this because the testimony of Goodwin logically accounted for many things about which other witnesses in the case testified, and that it corroborated the testimony of witnesses for petitioner that respondent was not hit by the front end of the train, and that it serves to throw great light upon how the thing actually must have happened. The Court again referred to the testimony of Goodwin (R. 183) and stated that if his testimony had been looked upon by the jury in a logical way it in nowise helped respondent, because, if Goodwin's testimony is correct, then respondent tried to go between the tender and the engine, out of sight of the train crew, and tried to cross over at a place where nobody could see him or was bound to look for him (R. 183).

The Court further found (R. 181) that the testimony of respondent's witnesses was simply shot full of contradictions and that they could not be reconciled even on the

theory of perjury; and further said (R. 181-182) that, if he were to hazard a guess as to how the thing actually happened, it would be that respondent attempted to pass between the rear end of the car and the front end of the locomotive, and that he was caught there, out of sight of the train crew, and injured. The Court then stated that that was only a theory, but that it seemed to be the only logical one in the case.

The Court then found (R. 182) that he was anxious to get rid of the case; that sympathy evidently played a great part in the verdict; that it is difficult to look at the little fellow without being almost overcome by sympathy, and that the jury were human; that he did not know that anything better would be done about it if he were to grant a new trial and give petitioner a chance to hang another jury. The Court said that he had the power (R. 182) to grant a new trial and that there could be no two views about the question that the verdict in the case is against the weight of the evidence, but the Court took the view that he did not have to grant a new trial on that ground, although he could safely do it. The Court then stated (R. 182) that it was a very close question, all things considered, whether there was any substantial evidence in the case under the federal rule; that he thought there was, legally speaking, substantial evidence, when the evidence was taken at its full value and giving but little consideration to the indefiniteness and contradictions that were obviously present.

The Court then stated (R. 182 and 183) that if he had not tried it once before and the jury had not hung, he would be disposed to set aside the verdict, but that, as it was, he was disposed to let the case be tried out in a court (evidently referring to the Court of Appeals) that has no eye picture of the boy or his situation and his lamentable condition. The Court further said (R. 183) that he would be perfectly safe in setting aside the verdict on the ground that it is against the weight of the evidence, and that if the case had not been tried twice before —once with a nonsuit taken and once with a hung jury— he would set aside the verdict, but that under the circumstances he believed he would let petitioner's counsel try the matter out in the Court of Appeals, which he thought ought to be done and which he predicted would be done.

Before closing his decision, the Court, referring to respondent's witnesses and their credibility, said (R. 184) that inferences were to be drawn from the testimony of many of respondent's witnesses which produce the inevitable conviction that they did not know what they were talking about; witnesses who contended that the train was going ten miles an hour, yet testified that somebody crawled between two box cars while the train was moving, getting from one side to the other, in order to aid the boy. The Court said that that might have happened, but to him it was wholly improbable. He again referred to the fact that one of the witnesses testified that it took him ten minutes to go from a certain place down to the train and

that evidently he was badly mistaken. And again the Court repeated that the evidence was shot through with contradictions and inconsistencies.

The Court, therefore, after finding all of these facts favorable to petitioner; and that the verdict was manifestly and palpably against the weight of the evidence, overruled the motion for a new trial for three reasons: First, because he did not believe, on account of sympathy for the boy, petitioner could ever get a verdict from a jury. Second, that the Court of Appeals could pass upon the cold record (as he called it) and consider the question of liability without sympathy caused by the presence of the boy. Third, that the case had been tried three times, once with the Court about to direct a verdict for petitioner and the consequent nonsuit, and the second with the jury failing to agree, and that if it had not been tried those two times he would grant a motion for a new trial because the verdict was against the weight of the evidence.

This summarized statement is necessary in the length that we make it in order to raise the two questions sought to be raised by petitioner here, namely: First, whether or not a verdict ought to have been directed in favor of petitioner, and, second, whether or not the Court, after its finding of conceded and undisputed facts, in the exercise of sound judicial discretion, ought to have granted a new trial, and whether or not the trial court having failed, after finding facts which required the motion for a new

trial to be granted under the law, to grant a new trial when sound judicial discretion required it so to do, such action was so arbitrary, in view of the conceded and undisputed facts, that said ruling could be assigned as error in the Court of Appeals and in this court.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. There is not under the federal rule that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether respondent was on and crossing, or attempting to cross, Bond avenue at the time of his injury, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure in the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

2. There is not, under the federal rule, that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether respondent was hit by the front end of the engine, considering the front end as the forward part of the engine the way the train was moving at the time, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure of the required quan-

tum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

3. There is not under the federal rule that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether petitioner's servants violated the order of the Illinois Commerce Commission and did not, before passing over Bond avenue, come to a stop and require one of the crew to flag the crossing and warn all persons attempting to cross the crossing of the approach of the train, and, this being a material element of respondent's case, a verdict should have been directed by the District Court because of failure of the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

4. Because there is not under the federal rule that quantum of evidence in this case sufficient to submit this case to the jury on the necessary and material elements of fact necessary to be proven by respondent in order to sustain a verdict in his favor against petitioner. Therefore, a verdict should have been directed in favor of petitioner by the District Court because of failure of the required quantum of evidence in this respect, and the judgment of the District Court should have been reversed by the Court of Appeals for this reason.

5. Because the evidence for respondent upon which the Court of Appeals affirmed the judgment of the District Court is so uncertain, indefinite, conjectural, circumstantial and negative that it cannot, under the federal rule, raise a question of fact upon the material questions in the case against the positive testimony of petitioner's witnesses, and, therefore, the District Court should have directed a verdict in favor of petitioner, and, after the District Court failed so to do, the Court of Appeals should have reversed the judgment of the District Court.

6. Because as to all of the above matters raised, concerning the direction of a verdict in favor of petitioner, the Court of Appeals and the District Court have decided these questions in a way probably untenable and in conflict with the weight of authority, and particularly contrary to the decision of this Court in the recent case of Gunning v. Cooley, 281 U. S. 90, wherein the rules to be applied in determining whether a verdict should be directed are collated and laid down.

7. Because the District Court, in refusing to direct a verdict in favor of petitioner, and the Circuit Court of Appeals, in affirming the judgment of the District Court, have decided a federal question in a way in conflict with the applicable decisions of this Court, in this, that they have failed to apply the rules laid down in Gunning v. Cooley, 281 U. S. 90 (the latest expression of this Court upon that subject), relative to the quantum of evidence required legally to permit the submission of a case to a

jury, and have decided that question contrary to that decision of this Court and the cases therein cited.

8. Because even if, for the purpose of argument, it should be conceded that a jury question was raised by the evidence, yet it was the duty of the trial court, after its finding of conceded and undisputed facts, in the exercise of a sound judicial discretion, to grant a new trial, and the trial court having failed, after finding facts which required the motion for a new trial to be granted, to grant a new trial, when sound judicial discretion required it so to do on such facts so found and conceded, the action of the trial court in refusing to grant a new trial under such circumstances was arbitrary and constituted a failure to exercise sound judicial discretion in determining that matter, and that the Circuit Court of Appeals erred in not reversing the judgment of the District Court for that reason, and under such circumstances the failure of the District Court to grant a new trial and the action of the Circuit Court of Appeals in affirming the judgment with that error assigned can be assigned as error and urged here.

9. In holding that it could not or should not reverse the judgment of the District Court on account of the matters and things set forth in reason No. 8, the Court of Appeals has decided an important question of federal law which has not been, but should be, definitely settled by this Court.

10. In holding that, under the circumstances herein set forth, the action of the trial court in refusing to grant a new trial could not be assigned as error or reversed by the Court of Appeals, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and also sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

11. Under the circumstances cited herein, the action of the Circuit Court of Appeals in affirming the trial court upon this last proposition can be assigned here as error, and constituted error under the decisions of this Court.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8879, Southern Railway Company, a corporation, Appellant, v. Edward Walters, a minor, by Herman Walters, his father and next friend, Appellee"; and that said judgment of the said United

States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Cour. may seem meet and just, and your petitioner will ever pray.

SOUTHERN RAILWAY COMPANY,
a Corporation,

By H. O'B. COOPER,
RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Counsel for Petitioner.

L. E. JEFFRIES,
S. R. PRINCE,
R. E. COSTELLO,
SAMUEL B. McPHEETERS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. .....

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by HERMAN WALTERS,
His Father and Next Friend,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The opinion of the trial judge in the District Court on the motion for a new trial is not officially reported. It appears in the printed record, from pages 180 to 184, both inclusive.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet officially reported, even in the Advance Sheets. The opinion was handed down by the United States Circuit Court of Appeals on

February 14, 1931, and appears in the printed record, from pages 205 to 212, both inclusive.

II.

JURISDICTION.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the Act of February 13, 1925, 43 Stats. 938; U. S. Code Annotated, Title 28, Vol. 4, page 359.

2. The original date of the judgment to be reversed is February 14, 1931 (R. 212-213). Petition for rehearing was filed March 10, 1931, within the time provided by the rules of the Circuit Court of Appeals (R. 215), and the petition for a rehearing was denied March 18, 1931 (R. 231).

3. Only two questions are raised in this Court on this record. The first question is whether the trial court should have directed a verdict in favor of petitioner, and whether the Circuit Court of Appeals erred in not reversing the judgment of the trial court because of its failure to direct a verdict for petitioner. This question was raised by a proper motion and written instruction offered at the close of respondent's evidence (R. 118), and by proper motion with written instruction requested at the close of all the evidence in the case (R. 164). These motions were in the nature of demurrers to the evidence, with written instruc-

tions submitted at each time, instructing the jury that under the pleadings and the evidence adduced their verdict should be for petitioner (R. 118 and 164).

The second and only other question raised here is whether or not the trial court exercised sound judicial discretion and did not act arbitrarily when it overruled petitioner's motion for a new trial, and whether or not the judgment of the trial court should have been reversed by the United States Circuit Court of Appeals for such reason. This question was raised by petitioner's exception to the action of the trial court in overruling and denying the motion for a new trial, and in refusing to set aside the verdict and judgment herein, and to grant unto petitioner a new trial for the reasons as then assigned in the exception (R. 184) that after finding the facts found by the Court in its decision on the motion for a new trial, it then and there became and was the duty of the trial court under such facts so found by it, in the exercise of a sound judicial discretion, to grant said motion for a new trial and to set aside the verdict and judgment herein, and to grant unto petitioner a new trial, and for the reason that under such facts so found by the Court in its decision on the motion for a new trial the Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the Court in refusing and denying petitioner's said motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion by the Court (R. 184-185).

In the United States Circuit Court of Appeals the question concerning the direction of a verdict was raised by the third, fourth, fifth and sixth assignments of error (R. 22), and the question relative to the failure of the Court to exercise sound judicial discretion in passing on the motion for a new trial was raised by the seventh and eighth assignments of error (R. 22-23).

4. Counsel for petitioner know of no case since the amendment of Section 240 of the Judicial Code by the Act of February 13, 1925, expressly sustaining the jurisdiction of this Court to issue its writ of certiorari in a case of this character. However, section 240, as amended, clearly confers discretionary jurisdiction upon the Court to bring up a case of this character from the Circuit Court of Appeals by certiorari, and subparagraph B of paragraph 5 of Rule 35 of this Court clearly recognizes such right.

III.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV.

SPECIFICATION OF ERRORS.

1. The District Court erred in refusing to give and read to the jury the written request for an instruction in the nature of a demurrer to the evidence, asked by petitioner at the close of all the evidence offered in the case, which said instruction so offered and then and there refused by the Court is in words and figures as follows, to wit:

> "At the close of all the evidence in the case the Court instructs the jury that under the law, the pleadings and the evidence plaintiff is not entitled to recover, and your verdict must be for defendant."

2. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to reverse the judgment of the District Court on account of the error of the District Court as set forth in specification of error No. 1 herein.

3. The District Court erred in overruling and denying petitioner's motion for a new trial in this case, and in refusing to set aside the verdict and judgment herein and in refusing to grant unto petitioner a new trial, as requested and prayed by the petitioner, for the reason that after finding the facts found by the District Court in its decision upon such motion for a new trial, it then and there became and was the duty of the District Court under such facts so found by it, in the exercise of a sound judicial discretion to

grant said motion for a new trial, and to set aside the verdict and judgment herein, and to grant unto petitioner a new trial, and for the reason that under such facts so found by the District Court in its decision aforesaid, the District Court failed to exercise its sound judicial discretion in refusing and denying said motion, and for the reason that the action of the District Court in refusing and denying petitioner's said motion for a new trial was arbitrary and constituted and was an abuse of sound judicial discretion by the District Court.

4. The United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to reverse the judgment of the District Court on account of the refusal of the District Court to grant petitioner's motion for a new trial for the reasons set forth in specification of error No. 3 herein.

5. The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court.

6. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing and refusing to reverse the judgment of the District Court.

V.

SUMMARY OF THE ARGUMENT.

Point A. The trial court should have directed a verdict in favor of petitioner, and the United States Circuit Court

of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

Point B. The trial court, in the exercise of a sound judicial discretion, after its findings on the motion for a new trial, should have granted a new trial to petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

VI.

ARGUMENT.

Point A.

The trial court should have directed a verdict in favor of petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

Under the facts in this case, when considered in connection with the well-established rule in the federal court relative to the direction of a verdict, a verdict should have been directed for petitioner in this case. Under the federal rule a scintilla of evidence is not sufficient, but there must be reasonable and substantial evidence for the plaintiff before the case can be submitted to the jury, and the evidence in favor of the plaintiff must be of such a conclusive and substantial character that if a verdict were returned for the plaintiff the Court would not have to set it aside in

the exercise of sound judicial discretion. If the Court, even with conflicting evidence, in the exercise of sound judicial discretion, ought to set aside a verdict for the plaintiff, if rendered, then, under such circumstances, a verdict should be directed in favor of the defendant, even if the evidence be conflicting; yet if it is all on one side, or is so overwhelmingly on one side as to leave no doubt as to what the fact is, the Court should give a peremptory instruction.

Hardy-Burlingham Mining Company v. Baker, 10 F. (2nd) 277, 278, 279;
Norfolk and Western R. R. Co. v. Collingsworth, 32 Fed. (2nd) 561;
Kansas City Southern R. R. Co. v. Jones, 276 U. S. 303;
Delaware R. Co. v. Koske, 279 U. S. 7;
Atlantic Coast Line v. Davis, 279 U. S. 34;
Small v. Lamborn Co., 267 U. S. 248-254;
Roberts Federal Liability of Carriers (2nd Ed.), Vol. 2, Sec. 1028, pp. 1970-1971;
C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472;
St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265;
St. L. & S. F. Ry. Co. v. Mills, 271 U. S. 344;
Atlantic Coast Line v. Driggers, 279 U. S. 787;
W. & A. R. R. Co. v. Hughes, 278 U. S. 496;
Gunning v. Cooley, 281 U. S. 90 (Adv. Sheets, Vol. 1);
Slocum v. N. Y. Life Ins. Co., 228 U. S. 364-369;
Improvement Co. v. Munson, 14 Wall. 442-448;
Pleasant v. Fant, 22 Wall. 116-122;

N. Y. C. R. Co. v. Ambrose, 280 U. S. 486;
M. & R. V. Ry. Co. v. U. S., 270 U. S. 280;
Lamborn v. Woodard, 20 Fed. (2nd) 635-637.

A scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, does not require the submission of the case to the jury.

Small v. Lamborn Co.; 267 U. S. 248-254.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant.

Delaware R. Co. v. Koske, 279 U. S. 7.

And the evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury.

Atlantic Coast Line v. Davis, 279 U. S. 34.

The legal effect of the evidence is a question of law.

M. & R. V. Co. v. U. S., 270 U. S. 280.

Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be clearly proven and not themselves presumed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472-477.

If the record leaves the matter in the realm of speculation and conjecture, then a verdict should be directed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472-477.

In the recent case of Gunning v. Cooley, 281 U. S. 90, this Court has summarized and laid down the rules relative to the direction of a verdict. So far as this case is concerned that case may be summarized as holding that a verdict should be directed: 1. Where the evidence, with all reasonable inferences, does not constitute a sufficient basis for a verdict for the plaintiff, so that such a verdict if returned would, in the exercise of sound judicial discretion, have to be set aside by the Court. (Also see Small v. Lamborn Co., 267 U. S. 248-254.) 2. Where even though there be a scintilla of evidence to sustain plaintiff's case, and even though there be some evidence for the plaintiff, yet it is not evidence upon which a jury can properly proceed to find a verdict for the plaintiff. 3. Where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is.

Petitioner concedes that issues depending upon the credibility of witnesses or the weight of the evidence are to be decided by the jury if the evidence is reasonable and substantial and attains the dignity required. It further concedes that the evidence for the plaintiff must be taken to prove all that it reasonably may be found sufficient to establish. Under these rules (which we think will be

undisputed) the first question that arises is whether or not there was that quantum of reasonable and substantial evidence on behalf of respondent to require this case to be submitted to the jury.

Petitioner's counsel will not repeat here what has been said in the statement of facts. Our contention is that under those facts the evidence for the respondent is inconclusive, indefinite, speculative, conjectural, negative and circumstantial in character, not based upon a proper knowledge of or ability to know the facts concerning which they testified, and that it cannot make a question of fact in this case against the positive testimony of five witnesses that the train stopped and that the crossing was flagged, and that respondent was not hit by the front end of the engine the way the train was traveling, which would be the end that the tender was on.

In addition to calling attention to our statement of facts as to what the evidence was on these two propositions, necessary to make out respondent's case, we desire only to correct here some misstatements and improper deductions as to the evidence in the opinion of the Circuit Court of Appeals.

To make out respondent's case it was necessary to prove that the train did not stop as required by the Commission's order; that respondent was hit by the front end of the train the way it was moving, and that the failure to stop, if the train did fail to stop, and the failure to flag the

crossing, if it was not flagged, was the proximate cause of respondent's injuries.

We have no point to make on the question of proximate cause, because if the boy was hit by the front end of the engine the way it was moving, and if the train did not stop, and the crossing was not flagged, then the failure to stop would be the proximate cause of his injuries; at least a question of fact would be raised upon that proposition if the first two propositions are proven.

In the printed record (R. 215-229) appears petitioner's petition for rehearing in the Court of Appeals. On the question of the motion to direct and the reference in the opinion to the failure to except to the charge, we call attention to the fact that the decision on the motion to direct came up before the charge was given and the point was then saved and nothing in the charge, or failure to except to it, could change the legal situation as to whether or not the motion should have been granted when offered. Furthermore, a reference to the Court's charge (R. 170) will show that the Court did submit to the jury the question of whether the front end or the rear end of the engine hit respondent.

As to Ruth Schiele's testimony, quoted in the opinion of the Court of Appeals, we call attention to the trial judge's commentary on her testimony (R. 181), and the fact that there was no gate through which she said she could see, and that she could not see through the gate she says she saw through.

Furthermore, in regard to the testimony of the engineer on cross-examination (R. 142), we call attention to the fact that he was only asked for an approximation and that the question was as to distance and the answer was as to time, thereby making an unintelligible answer to the question.

As to the testimony of McKenzie, referred to in the opinion, our statement answers the Court upon that proposition. The opinion of the Court of Appeals says that McKenzie testified the train was moving at a rate of speed of fifteen miles per hour. An examination of his testimony will show that he did not make such a statement, but he said (R. 64) that he was traveling in his automobile at a speed of fifteen miles per hour, and, as shown in our statement, the testimony that he was traveling fifteen miles an hour, and not the train, corroborates petitioner's witnesses that the speed of the train was never in excess of five or six miles per hour.

The opinion of the Court of Appeals mentions the testimony of Thomas Heher as sustaining respondent's case. Instead of sustaining respondent's position it sustains petitioner's position, because this witness testified (R. 52) that it took the train ten minutes to go from half a block south of Bond avenue to six car lengths north of Bond avenue. His testimony also shows that he never saw the train from ten minutes before the accident until after the accident, and this testimony sustains petitioner's position that the train did stop.

That Corda Pettit, whose testimony is quoted in the opinion, could not know anything about it when she said that the train did not stop is shown by her testimony (R. 28-31) that when she first saw the train the engine and several cars had crossed over Bond avenue. The trial judge then took her in hand (R. 32) and clearly showed that she could not know whether the train stopped before it reached Bond avenue.

Furthermore, as to the testimony of Mrs. O'Dell, quoted in the opinion, petitioner submits that the Court there overlooked the fact that her negative testimony that she did not see any men on the engine cannot raise a question of fact against the positive testimony of the train crew that men were on the front end of the engine.

With reference to the testimony of James Goodwin, the Court of Appeals apparently also overlooked his testimony, as set forth in our statement of facts, and also Judge Faris' statement to the jury as to what his testimony was (R. 170), and the trial judge's characterization of the testimony and what it showed on the motion for a new trial (R. 181-183).

On the question of the speed of the train, attention is called to the trial judge's charge to the jury on the question (R. 166), and to his statement concerning it on the motion for a new trial, and particularly his characterization of these witnesses attempting to testify on the question of speed (R. 184). Furthermore, as to Mrs. O'Dell's

testimony, the Court of Appeals overlooked her testimony on redirect examination (R. 43), where she said it took fifteen to twenty minutes for the train to go by, and that she thought it never would go by—it was moving so slowly.

The Court of Appeals also overlooked upon this point the fact that the negative, uncertain, speculative and circumstantial, conjectural testimony of these witnesses was merely a conclusion, based upon unsubstantial information, and being uncertain, speculative, circumstantial, conjectural and negative, without any basis to give it strength, cannot prevail against the positive testimony of the train crew upon these material questions so as to make a question of fact for the jury.

Therefore, petitioner submits under this point that there was not that quantum of reasonable, certain and substantial evidence upon the material points so as to permit this case properly to be submitted to a jury, but that the trial court ought to have directed a verdict for petitioner, and that the judgment of the trial court should have been reversed by the Court of Appeals for its failure so to do, and that this petition for certiorari ought to be granted in order that upon full and complete hearing of the cause the error committed by the trial court and the Court of Appeals may be here corrected.

Point B.

The trial court, in the exercise of a sound judicial discretion, after its findings on the motion for a new trial, should have granted a new trial to petitioner, and the United States Circuit Court of Appeals should have reversed the judgment of the trial court on account of its failure so to do.

The Court's opinion in deciding the motion for new trial, which is summarized in the statement and set forth in full in the printed record (R. 180-184), and the exceptions thereto (R. 184-185), is the basis for raising this point here.

At the ontset of our argument on this point, we concede, as we did in the Court of Appeals, that ordinarily the denial of a motion for a new trial, being in the discretion of the trial court, is not reviewable on appeal, and call attention to the fact that we raised this point in the Court of Appeals and are raising it here solely on the ground that, after the Court found the facts as it did, the Court acted arbitrarily and failed to exercise sound judicial discretion in applying the law to those findings of fact. That under such circumstances the action of the Court in denying the motion for new trial can be assigned as error is clearly set forth by the authorities. A leading case on this subject is Felton v. Spiro, 78 Fed. 576, where this rule was laid down in an opinion by Mr. Justice Taft, then a Judge of the Sixth Circuit, in which Judge

Lurton concurred as a member of the Court, and which laid down the rule above stated on the authority of Mattox v. U. S., 146 U. S. 140; Ry. Co. v. Lowery, 74 Fed. 463, and Insurance Co. v. Randolph, 78 Fed. 754. Furthermore, in Union Tool Co. v. Wilson, 259 U. S. 107-112, this Court, in an injunction case, where the same rule as to discretion applies, said that legal discretion does not extend to a refusal to apply well-settled principles of law to a conceded state of facts. This Court, in support of its decision on that point, cited Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493. To the same effect is In re Sobol, 242 Fed. 487-489.

In the case of Eureka Tool Company v. Wire Rope Appliance Co., 265 Fed. 669, decided by the Circuit Court of Appeals for the Ninth Circuit, the trial court made certain findings of fact and then found the defendant in errror not guilty of contempt. Upon review, the Circuit Court of Appeals held that the only conclusion it could come to under the findings of the District Court was that it was an abuse of sound judicial discretion on the part of the District Court to purge the defendant in error of contempt, and for that reason reversed the judgment of the District Court. In this case certiorari was denied by this Court in 254 U. S. 624.

To the same effect are the cases of City of Des Moines v. Des Moines Water Co., 230 Fed. 570-574, and United Press Association v. National Newspaper Association, 254 Fed. 284-285.

The law upon the subject is well stated and forcefully laid down by the United States Circuit Court of Appeals for the Eighth Circuit in Paine v. St. Paul Union Stock Yards Co., 28 Fed. (2nd) 463, where the Circuit Court of Appeals for the Eighth Circuit said:

> " 'Speaking generally, an order granting or denying a motion for a new trial in the federal court is discretionary with the trial court, and is not reviewable on writ of error, or on appeal (Holmgren v. United States, 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Clyde Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct. 50, 36 L. Ed. 917).
>
> " 'The action of the Court, however, must not be arbitrary. It may not grant a new trial merely because one of the parties so desires, or for reasons which are not recognized as legitimate grounds for such action. The Court should keep within well-recognized rules in dealing with such a motion. Otherwise there is an abuse of discretion, and in such cases, very properly, a review may be had (United Press Association v. National Newspaper Association [C. C. A.], 254 F. 284 [8th Circuit]; Yeates v. United States [C. C. A.], 254 F. 60; Vallery v. Glenwood Irr. Co. [C. C. A.], 248 F. 483 [8th Circuit]).' "

And further, on the same page, said:

> "The granting of a new trial is, generally speaking, within the discretion of the trial judge, and, unless that discretion patently has been abused, his ruling on a motion for a new trial is not subject to review (Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct.

50, 36 L. Ed. 917; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Holmgren v. United States, 217 U. S. 509, 521, 30 S. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778). He cannot, of course, refuse to exercise his discretion, and, if he does so refuse, then that is a matter for the examination of the Court of Appeals (Felton v. Spiro [C. C. A.], 78 F. 576, 579; Mattox v. United States, 146 U. S. 140, 147, 13 S. Ct. 50, 36 L. Ed. 917; Ogden v. United States [C. C. A.], 112 F. 523, 525)."

The Court further filed an additional opinion to the same effect on rehearing in the last mentioned case, which is reported in 35 Fed. (2nd) 624.

In Railroad Company v. Moon, 121 U. S. 558, l. c. 570, this Court said:

"In many cases it might be the duty of the Court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial."

In its opinion on this question the Court of Appeals (R. 211-212) merely says that this is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, and without further statement holds that under such circumstances the action of the trial court could not be assigned as error or considered on appeal. It is true

that the District Court passed on the motion for a new trial, but the Court found facts that sustained petitioner's contention in every way; the fact that the witnesses for the respondent were not to be believed with the exception of the boy, Goodwin; the fact that his testimony corroborated the testimony of petitioner's witnesses; the fact that the verdict is palpably and manifestly against the weight of the evidence, and then after such findings, which required a new trial to be granted if the Court so believed (and his findings to that effect appear in the bill of exceptions). The Court assigned three reasons for not granting the motion for a new trial: First, the Court said that he did not believe that with the natural sympathy that would exist for the boy that a verdict could ever be obtained in favor of petitioner, no matter what the evidence was. It is submitted that this was not sufficient ground to refuse the motion for a new trial, and it shows that the Court did not exercise sound judicial discretion when he overruled the motion for that reason. Second, the Court assigned as a reason for not granting the motion that the case ought to go to another court on a cold record, where, without a picture of the boy and the sympathy thereby excited, the Appellate Court could pass upon the question without the sympathy of the boy's presence. That this was not exercising sound judicial discretion is apparent, for the reason that under the law the Circuit Court of Appeals cannot review facts in a jury case except to determine whether or not there is sufficient evidence for the case

to go to the jury; and after the trial court expressed an opinion on the motion for a new trial it was his duty, in the exercise of sound judicial discretion, to grant it and not send it on to another court for a wrong reason, and to a court which had not the right to pass upon the facts as the trial court did. Third, the main reason assigned by the trial court for not granting the motion for a new trial was that the case had been tried twice before. The trial court expressly said that if it had not been tried twice before he would grant a new trial. This verdict is the first verdict that was ever returned against petitioner. It is not a case where two or more verdicts had been returned for a party. In the first trial in the federal court at East St. Louis, the Court being of the opinion that respondent had not made out a case and being about to direct a verdict, respondent took a nonsuit. In the former trial in the District Court at St. Louis, the jury failed to agree. We submit that this is not sufficient justification for the Court to refuse a new trial after finding from the facts that one should be granted.

At common law a court could set aside a verdict when against the weight of the evidence, and such right was not taken away by the Seventh Amendment to the Constitution (Felton v. Spiro, 78 Fed. 576, 582, 583). True, the exercise of the right is discretionary with the trial court, but that discretion must be a sound judicial discretion. As said in other cases cited herein, the discretion used must be sound judicial discretion, and the duty to grant

the motion exists when the verdict is palpably and manifestly against the evidence, even though conflicting. Here the trial court found that the discretion ought to be exercised except for three reasons, none of which were sufficient and all of which were unsubstantial. As Judge Taft said in Felton v. Spiro, 78 Fed. 576-583:

> "The defendant receiver, therefore, is entitled to have the court below weigh all his evidence, and exercise its discretion to see whether or not in its opinion the verdict was so opposed to the weight of the evidence that a new trial should be granted."

Here the Court did not exercise its sound judicial discretion, but after finding that the motion for a new trial ought to have been granted except for the three reasons stated, denied the motion for a new trial for those three reasons alone, none of which are sufficient.

Therefore, we find this case as above set forth, with every finding in favor of the petitioner and with the refusal after such findings to grant the motion for reasons that are unsubstantial and not sufficient in law; and we submit that the Court acted arbitrarily after finding the facts as it did and failed to exercise sound judicial discretion when it overruled and denied petitioner's motion for a new trial.

This precise question, so far as we have been able to find, has never been passed upon by this Court. The cases from this court cited by analogy, in our opinion,

sustain our position, as do the cases cited from the courts of appeal. This important question, we submit, ought to be determined finally and authoritatively by this Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed in order that justice may be done to petitioner; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

EDWARD WALTERS, a Minor, by
HERMAN WALTERS, His Father
and Next Friend,
Respondent.

No. 52.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.

LOUIS E. MILLER,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

SOUTHERN RAILWAY COMPANY, a Corporation,
Petitioner,
vs.
EDWARD WALTERS, a Minor, by HERMAN WALTERS, His Father and Next Friend,
Respondent.
No. 52.

On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF.

STATEMENT.

This suit originated in the United States District Court for the Eastern District of Missouri, and upon trial before Honorable C. B. Faris, District Judge, and a jury resulted in a verdict for the plaintiff in the sum of $43,000. A motion for a new trial was duly and timely filed and the Court ordered that the motion for a new trial be overruled provided the plaintiff would remit the judgment

down to $28,000. In due time plaintiff remitted $15,000, whereupon a new judgment in the sum of $28,000 was entered and defendant's motion for a new trial was overruled. Thereafter and in due time defendant perfected its appeal to the United States Court of Appeals for the Eighth Circuit, which Court affirmed the judgment of the lower court. Thereafter certiorari was applied for and in due course issued by this Court, and in obedience to the writ of certiorari heretofore granted by this Court the case now comes on to be heard.

The plaintiff, a minor, who at the time of his injury was 5 years old, was struck by one of the petitioner's trains in East St. Louis, Illinois, and seriously and permanently injured. The petition upon which the case was tried charged that the defendant was negligent, in that it violated a ruling of the Illinois Commerce Commission requiring that all trains, before passing over the crossing where plaintiff was injured, must come to a stop, and one of the crew thereof shall be required to flag said crossing and warn all persons attempting to cross said crossing of the approach of the train. This is the sole assignment of negligence upon which the case was submitted to the jury, and the plaintiff's evidence tends to prove that after he was discharged from school he proceeded across said tracks in an eastwardly direction when he was struck by the forward end of a northbound train. The evidence further tends to show that said train did not stop before proceeding across said Bond avenue crossing, nor did any

member of the crew thereof flag the crossing as required by the ruling of the Illinois Commerce Commission.

Inasmuch as one of the points now being urged before this Court is that there was not substantial evidence warranting the submission of this case to the jury we shall briefly comment upon the testimony for the purpose of showing to the Court that there was in fact substantial evidence and that the trial judge was fully justified, under the law, in submitting the case to the jury.

Corda Pettit, the first witness offered by the appellee, testified that she was driving west on Bond avenue toward the railroad track and that, as they approached the track, the automobile was stopped to let the train go by; that as they reached the intersection the engine had just crossed Bond avenue (Tr., p. 25). She also testified that she did not see the train stop before crossing Bond avenue, and that if it had stopped she believed she would have noticed it (Tr., p. 30).

Mrs. Edith Odell, witness for appellee, testified that she was driving the automobile in which Mrs. Pettit was a passenger, and before reaching the railroad track she observed the train (Tr., p. 34). When she first saw the train it was about 75 or 100 feet south of the Bond avenue crossing and proceeding in a northwardly direction (Tr., pp. 40-41); that she saw no men on any part of the engine or tender (Tr., p. 39). Witness further testified that she was about 75 feet from the crossing when she first ob-

served the train (Tr., p. 43), and that when she observed the train coming northwardly on the tracks she brought her automobile to a stop so as to permit the train to get by ahead of her (Tr., p. 34), and that after two or three of the cars had passed over the crossing she saw the boy on the opposite side of the train, lying in the street (Tr., p. 35).

Thomas Heher, another witness for appellee, testified that he had stopped at a filling station to buy some gasoline and that his attention was attracted by the scream of a woman and that he saw appellee under the train (Tr., p. 45); that he is familiar with the speed of moving vehicles and that, in his opinion, at the time he observed the train it was proceeding at a rate of speed of about 10 miles per hour, and that before hearing the woman scream he did not hear any bell or whistle sounded (Tr., pp. 52-3).

John McKenzie, a witness for the appellee, testified that he was a salesman for the Liberty Bell Oil Company, and that he had driven his automobile across the Free Bridge, and that he tried to go up several streets but was cut off by the train, and that the train was moving and he tried to get around it (Tr., p. 61); that Tenth street runs right off of the Free Bridge, and that as he left the Free Bridge he drove north on Tenth street; that there are three or four streets which run east and west from Tenth street at that place; that he intended to go to the Mississippi Warrior Service under the Free Bridge; that he intended to

turn west down the first street, but that he observed a train moving north and, upon reaching the next street, intending to turn west, he saw the same train moving north; and with reference to the next street he also looked west and observed the same thing, namely, the moving train, and that when he reached the next street, which was Bond avenue, he turned west into said street, and that, after turning west into Bond avenue, he observed the hind end of the engine as it had just crossed Bond avenue (Tr., pp. 62-63). Witness further testified that, after getting up to the train, he saw the boy lying in the street on the opposite side of the train.

Witness further testified that the train was moving at all times after he first observed it when he attempted to turn west at the first street after leaving the Free Bridge, and witness positively testified that it never stopped at any time after he first observed it until it had passed over the Bond avenue crossing (Tr., pp. 64-65). Witness further testified that when he first turned west into Bond avenue the hind end of the engine had just crossed Bond avenue, and that as he was driving two blocks west on Bond avenue to reach the tracks about ten or fifteen cars had passed over the intersection, and that it is his opinion that he was moving at a rate of speed of fifteen miles per hour (Tr., pp. 66-67).

Ruth Sheeley, witness for appellee, testified that she was a pupil at the Franklin School, age 11 years, and in the

fifth grade; that on March 3, 1927, in the afternoon, she observed some little boys who had just gotten out of school coming along Bond avenue, some of whom were running; that the train was coming and that about three or four of the little boys got across the track, but that the plaintiff did not; that they were going away from school; that the school is on the west side of the tracks, and that the plaintiff was hit by the engine and knocked on the track, and a man came along and picked him up and drug him out from under the train (Tr., pp. 73-74).

Witness testified that at the time she saw the foregoing she was standing on a landing right as you come into the door of the school building, and that she was looking toward the railroad tracks out of the doors, and that she was watching the little boys running along the sidewalk on the west side of the track, and that when she saw them they were at the end of the sidewalk on the west side where it ends, just where the tracks cross (Tr., pp. 80-81).

Witness further testified that there was a solid board fence between her and the railroad track, and that in that fence there was what was known as a teachers' gate, but that the gate was open and she could see through the gate and see the boys on the sidewalk, but that if the gate were closed she could not have seen them (Tr., p. 77).

Witness testified that there was glass in the doors of the school building through which she was looking (Tr., p. 88), and that the level of the landing on which she was standing was higher than the school yard (Tr., p. 91). In

referring to the teachers' gate in the board fence the witness testified that it was down, that is, hanging on the bottom hinge, but that the janitor thereafter fixed it (Tr., pp. 76, 91). Witness further testified that there was no bell or whistle sounded and that the train did not stop (Tr., p. 79).

Witness further testified that the train was traveling north; that when she first saw the train it was about half a block south of the plaintiff, and that at that time the plaintiff was on the sidewalk on Bond avenue, west of the tracks; that she saw the train coming; that she was looking out of the glass in the doors.

James Goodwin, a witness for appellee, testified that he was leaning against a post and saw four boys start to cross the tracks, all of whom were running except the plaintiff, and that as plaintiff was crossing the tracks a train hit him and threw him back (Tr., p. 94); that he heard no bell or whistle sounded; that the three boys who ran got across the track ahead of the train (Tr., p. 104).

Edward Walters, the plaintiff, testified that he was a pupil in the Franklin School on the date of the accident; that he had been going to school about two or three weeks before the accident; that he lived east of the railroad tracks, and that in going to and from school he had to cross over the railroad tracks (Tr., pp. 105-111); that on the day of his injury he and some other boys were going

home from school, and that the other boys were running, but that he was walking, and that he did not see the train before he started across the tracks (Tr., pp. 108-109). Plaintiff further testified that when he first saw the train it was about a half of a block away, and that the front part of the engine struck him (Tr., pp. 110-111).

Benjamin F. Ward, witness for appellee, testified that he operated a filling station about seventy-five feet from the place where this accident occurred and that his attention was attracted by the scream of a woman and that when he looked in the direction of the scream he observed that the engine and one or two cars had passed over the Bond avenue crossing (Tr., p. 119), and that when he observed the moving train it was moving at a rate of speed between twelve and fifteen miles per hour (Tr., p. 122). Witness further testified that he did not observe the train stop at any time and that the appellee was lying near the west rail of the northbound track about six and one-half feet north of the sidewalk on Bond avenue (Tr., p. 121). Witness further testified that the schoolhouse sets up on a terrace, and that the sidewalk gradually goes up to it, and from the sidewalk up to the building there is a rise of about two feet (Tr., p. 124).

The appellant offered the testimony of several witnesses, who, it appears, comprised the crew of the train which struck the plaintiff; these witnesses, namely, G. W. Lane, Harvey Knight, John Luscomb, John R. Stewart, W. W.

Woodside and Charles G. Elmore, all present employes of the appellant, testified that the train did stop before crossing Bond avenue and that two short and two long blasts of the whistle were sounded and that two members of the crew were standing on the footboard of the tender (the foremost part of the engine as it was traveling northwardly); that one member of the crew went out ahead of the engine when it had stopped for the crossing and that none of the crew saw the boy hit nor knew of the happening of the accident until about two hours later.

John Lusqomb, the engineer in charge of the train, testified that it would require from three to five minutes running time in order to build up a speed of five or six miles an hour from a dead stop under the conditions there present (Tr., p. 163).

Rawlins Guthrie, witness for the appellant, testified that he is an engineer and is in the appellant's employ and was so employed in March, 1927, and that on March 10, 1927, or about a week after the accident, he prepared a drawing of the neighborhood of Eighth street and Bond avenue, which was introduced in evidence and appears at page 201 of the transcript. Witness further testified that there was a solid board fence in the school yard. This witness did not testify at the former trials of the case.

At the conclusion of the evidence the Court submitted the case to the jury in the following language:

"It is charged that the defendant here did not comply with that order, and that its failure to comply with that order caused the hurt of the plaintiff here. I say to you, as a matter of law, that the defendant was required to comply with that order. If it did comply with that order, then it was not guilty of negligence, and you cannot find against it. If it did not comply with that order then it was guilty of negligence, and you are warranted in finding for plaintiff, because of its failure to comply, for the simple reason that its failure to comply would constitute negligence. The question then for you is upon that point, the decisive question in this case: Did it comply? If it did, find for the defendant; if it did not, find for the plaintiff. That is all there is to this case, gentlemen."

POINTS AND AUTHORITIES.

I.

Inasmuch as there was substantial evidence to the effect that the train did not stop before proceeding across the Bond avenue crossing, and also that the plaintiff was struck by the train while attempting to cross in front thereof, the trial court properly overruled defendant's motion for a directed verdict and the ruling of the Circuit Court of Appeals sustaining the trial court was thoroughly justified.

Hardy Mining Co. v. Baker, 10 Fed. (2d), l. c. 279;
Crookston Lumber Co. v. Boutin, 149 Fed. 680;
U. S. F. & G. v. Blake, 285 Fed. 449;
Goldsmith v. Insurance Company, 114 Fed. 914;
Bergert v. Paine, 274 Fed. 784;
Gumming v. Cooley, 281 U. S. 90.

II.

The trial court properly exercised its discretion in overruling defendant's motion for a new trial.

Paine v. Stock Yards Company, 28 Fed. (2d) 463;
Holmgren v. U. S., 217 U. S. 509;
Mattox v. U. S., 146 U. S. 140;
United Press Company v. Association, 254 Fed. 284, 248 Fed. 483;
Vallery v. Irrigation Company, 248 Fed. 483 (8th Circuit);

Henderson v. Moore, 9 U. S. 5;
Newcomb v. Wood, 97 U. S. 581;
Hays v. Stine, 289 Fed. 224 (4th Circuit);
Yellow Cab Company v. Earle, 275 Fed. 928 (8th Circuit);
Ellerd v. Griffith, 29 Fed. (2d) 402 (9th Circuit);
Gajda v. Dairy Company, 18 Fed. (2d) 279 (6th Circuit);
Weed v. Petroleum Company, 300 Fed. 1005 (see, also, 294 Fed. 725, same case);
Spiro v. Felton, 78 Fed. 578 (6th Circuit);
Stewart v. Railroad Company, 229 Fed. 862;
Plummer v. Mining Company, 55 Fed. 755;
Pringle v. Guild, 119 Fed. 962;
Reeve v. Dennett, 137 Mass. 315.

(A) There is no competent evidence of record from which this Court can conclude that the trial judge has been guilty of manifest abuse of discretion.

(B) The comments made by the trial judge preliminary to overruling petitioner's motion for a new trial (set out at pages 206-210) constitute no part of the record and cannot be considered by this Court incident to a determination of this case.

Rector v. Askely, 6 Wall. 142 (73 U. S. 753);
Williams v. Norris, 12 Wheaton 116;
Gibson v. Chouteau, 8 Wall. 314 (75 U. S. 317);
England v. Gebhardt, 112 U. S. 502;
Johnson v. U. S., 160 U. S. 546;
Nolker v. Nolker, 226 S. W. 304 (Mo. Supreme);
Joblin v. Surety Co., 193 Mo. App. 132;
Mead v. Spaulding, 94 Mo. 43.

ARGUMENT.

I.

There is no dispute as to the law concerning directed verdicts in federal courts—that is, the necessity that there be substantial evidence in support of plaintiff's case.

Now, for the purpose of determining whether the plaintiff made out a case for the jury, it is necessary to consider the pleadings and the evidence.

The only assignment of negligence submitted to the jury was the failure on the part of the defendant to stop its train before proceeding across the Bond avenue intersection. Now, in order to meet this situation of the pleadings, it was necessary for the plaintiff to show, by substantial evidence, **first**, that the train did not stop at the crossing, and **second**, that he was struck by the train while attempting to cross in front thereof. At this point it may be well to observe that the engine which was pulling this train was coupled to the cars in reverse fashion—that is, that the front of the engine was headed south and the tender of the engine was headed north, the direction in which the train was traveling. (See photograph at page 211 of the transcript, Defendant's Ex. 3.)

In our statement of facts in this brief we have briefly set out the testimony of the several witnesses offered by the plaintiff, which we feel clearly indicates that the plaintiff has offered substantial evidence in support of the as-

signment of negligence upon which the case was submitted to the jury.

Plaintiff's witness **Pettit**, who was in a position to know, testified that she did not see the train stop before proceeding across the Bond avenue intersection.

Witness **Edith Odell** was driving her automobile toward the railroad tracks, and testified that when she was about seventy-five feet from the crossing the northbound train was about seventy-five feet south of Bond avenue, and that she stopped her automobile to permit the train to get by. If the train had stopped there would have been no occasion for this woman to have stopped her automobile to have permitted the train to have crossed ahead of her.

Petitioner's engineer, **John Luscomb**, testified that it would require from three to five minutes running time in order to build up a speed of five or six miles an hour from a dead stop (Tr., p. 163). This testimony is important in view of the fact that **Thomas Heher** testified that the train, in passing over the crossing, was moving at a rate of speed of about ten miles per hour, whereas **Benjamin Ward** testified that it was moving at a rate of speed between twelve and fifteen miles per hour. The engineer testified that it would have required three to five minutes of running time in order to build up a speed of as much as six miles per hour, and if the testimony of the witnesses as to the rate of speed is to be believed, then, under the physical facts, the engineer of the train did not, and could not, have stopped same before starting across the inter-

section. This is substantial evidence, and this, coupled with testimony of the witnesses **Cordia Pettit, Edith Odell** and **John McKenzie**, that the train did not stop, constitutes substantial evidence as to this element of the case. Now, as to the other necessary element, to wit, that the plaintiff was struck by the train while attempting to cross in front thereof, we have the testimony of the plaintiff himself, corroborated by **Ruth Sheely** and **James Goodwin**, all eyewitnesses to the accident and in position to give direct and first-hand information as to what they saw. This certainly constitutes substantial evidence. Of course, the credibility of these witnesses, and the weight to be given to their testimony, are questions for the jury.

We feel that the opinion of the Circuit Court of Appeals, written by Hon. Circuit Judge Gardner, so ably sustains the conclusion reached by it in upholding Judge Faris in his decision denying the petitioner's motion for a directed verdict that, rather than to indulge in further argument, we will adopt this in support of our contention and as our argument why the petitioner's motion for a directed verdict was properly denied.

As indicated at the outset, there is no dispute as to the law, viz., that there must be substantial evidence to warrant the submission of the case to the jury, consequently we shall not indulge in any extended discussion of the cases.

In Crookston Lumber Company v. Boutin, 149 Fed. 680 (8th Circuit), the Court said:

"A question of law always arises at the close of the evidence * * * whether there is any substantial proof warranting a verdict in favor of the plaintiff. In determining such question all of the evidence and reasonable inferences therefrom must be considered in the light most favorable to the plaintiff."

In the case of **Bergert v. Payne, 274 Fed. 784 (6th Circuit)**, the following language was used:

"A verdict cannot properly be directed for the defendant merely because the trial judge feels that, should the jury find in plaintiff's favor, he would regard it as his duty to set the verdict aside; the test is whether there is such an utter absence of substantial evidence as to make it his duty, as a matter of law, to set the verdict aside, independent of the exercise of discretion and without reference to how great the Court may think the conflict in the testimony to preponderate in defendant's favor."

In the Bergert case the trial judge, incident to sustaining plaintiff's motion for a directed verdict, stated that he did not believe the plaintiff's testimony and that if the case were submitted to the jury and it returned a verdict in plaintiff's favor he would feel it his duty to set the verdict aside. The Appellate Court reversed the case and remanded it with directions to submit the issues of fact to a jury for determination.

Again, in the case of **Hardy Mining Company v. Baker, 10 Fed. (2d), l. c. 279**, the Court said:

"We are convinced that there was evidence sufficient to support findings that there was gas in the mine; that the defendant knew it and was negligent in permitting it to be there. It may be that upon the printed record the weight of the evidence on these questions is very strongly against the plaintiff; upon that we intend to express no opinion, because that is a question for the jury."

This Court in the recent case of **Gunning v. Cooley, 281 U. S. 90**, had the following to say:

"The decisions establish a more reasonable rule, 'that, in every case, before the evidence is left to the jury there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Issues that depend on the credibility of witnesses and the effect of weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

In the Gunning case the evidence was, indeed, much closer than it is in the instant case on the question of negligence. However, in that case the Court held that there was some evidence to support plaintiff's case, and that the

question of the weight and credibility thereof was for the jury and not for the Court.

From the foregoing authorities we submit that, inasmuch as there was substantial evidence to prove the plaintiff's case, the Court very properly submitted the case to the jury, it being the province of the jury to weigh the evidence and to pass upon its credibility.

We, therefore, respectfully submit that the trial judge properly overruled appellant's motion for a directed verdict and rightfully submitted the case to the jury for determination on the disputed facts.

II.

The appellant contends that, even if this Court should decide that the petitioner's motion for a directed verdict was properly ruled, that the trial judge, notwithstanding, was bound to sustain the motion for a new trial on the ground that the verdict was against the weight of the evidence, and that his failure so to do was a manifest and patent abuse of discretion and the commission of an arbitrary and unwarranted judicial act. Inasmuch as the appeal in federal cases is not from the action of the Court in ruling on the motion for a new trial, the motion for a new trial is not a necessary part of the appeal as is the case in our state procedure.

However, in the early cases of **Henderson v. Moore, 9 U. S. 5**, and **Newcomb v. Wood, 97 U. S. 581**, this Court

held that the allowance or refusal of a new trial was in the sound discretion of the Court to which the application is addressed and that the result could not be made the subject of review by writ of error.

This rule was followed by this Court in the later case of **Mattox v. United States, 146 U. S. 140,** and in the still later case of **Holmgren v. United States, 217 U. S. 509.**

Subsequently the courts of appeal of the various circuits modified this rule by permitting appellate courts to review the conduct of trial judges incident to motions for new trials, where it was patent and manifest that the trial judge was arbitrary in his action and ruling. Inasmuch as the granting of a motion for a new trial rests within the sound judicial discretion of the trial judge, naturally this discretion cannot be reviewed, and unless there is positive and convincing evidence that the trial judge was arbitrary in his ruling the Appellate Courts would and should not interfere. Naturally, the Appellate Courts have always held to the presumption that the trial judge did not abuse his judicial discretion.

At this point we urge that there is absolutely no competent evidence or testimony in the record before this Court to justify a holding that the action of the trial judge was arbitrary and constituted an abuse of his judicial discretion.

In support of their contention that the trial judge abused his judicial discretion petitioner refers to the comment of the trial judge uttered before and preliminary

to his ruling on the motion for a new trial. (This comment is set out at pages 206-10 of the transcript.)

We respectfully submit that this comment is no part of the record and cannot be considered by this Court in a determination of this case.

This Court has held for a great many years that comments and opinions of lower courts do not constitute evidence and cannot be considered as such by the appellate courts.

In **Rector v. Askely, 6 Wall. 142 (73 U. S. 753)**, this Court said:

> "The opinion of the State Court constitutes no part of the record and cannot be looked to as the foundation on which this Court will take or refuse jurisdiction."

In the case of **Williams v. Norris, 12 Wheaton 116**, this Court again said:

> "The opinion of the Court or the reasons given for its judgment form no part of the record within the meaning of the twenty-fifth section, nor are they part of the record in Tennessee by the local law of that state requiring the Judges to file their opinions in writing among the papers of the cause."

The same ruling was made in the case of **Gibson v. Chouteau, 8 Wall. 314 (75 U. S. 317)**.

Still later, in the case of **England v. Gebhardt, 112 U. S. 502**, this Court said:

"The opinion of the court below is no part of the record. Our rule 8, section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on writ of error or appeal to this Court, but that of itself does not make it a part of the record below."

And even still later, in the case of **Johnson v. United States, 160 U. S. 546, l. c. 553,** this Court said:

"It is true mention is made in the opinion of the Court of claims of the time of his taking out his first papers, but we cannot act upon any such statement."

In this case the Court, following the ruling in the England case, held that the opinion of the court below is no part of the record upon which the case can be determined in the Supreme Court.

The same rule of law has been followed in the State of Missouri in the cases of **Joblin v. Surety Company, 193 Mo. Appeal 132, l. c. 138-139; Nolker v. Nolker, 226 S. W. 304;** and **Mead v. Spaulding, 94 Mo. 43.** In the latter case the Supreme Court of Missouri said:

"The written opinion of the trial court, when incorporated in the bill of exceptions, forms no part of the record, and will not take the place of instructions, and will not be looked to to ascertain how the disputed facts were found."

In the **Nolker v. Nolker** case **(226 S. W. 304)** the Court said:

"Opinions of the trial judge constitute no part of the record in the case, and consequently are not before us."

From the foregoing citations we respectfully submit that the comments of Judge Faris, appearing at pages 206-10 of the transcript, should not have been incorporated in the bill of exceptions nor in this transcript, and even though they are incorporated therein they have no proper place and under the law cannot and should not be considered.

To permit the consideration of comments and expressions of opinion announced before the rendition of a judgment would be to permit the impeachment of a judgment by collateral evidence. This has never been the rule.

Now, with the comments of Judge Faris eliminated from consideration there is absolutely nothing in the record upon which this Court could hold that the action of the trial judge on the motion for a new trial was in any manner abused. We feel that the weight of the testimony is in favor of the plaintiff. However, at worst there is a conflict in the substantial evidence sufficient to justify the overruling of a motion for a new trial on the weight of the evidence.

It is only in those cases where it is patent and apparent from the **undisputed evidence** that the verdict or judgment is for the wrong party or is improper that the appellate courts will review the discretion of the trial judge. A striking case supporting this contention is that of Val-

ler v. Irrigation Company, 248 Fed. 483 (8th Circuit). In this case the Court instructed the jury that if their finding was for the plaintiff they should return a verdict in his favor for $2,000.00, the face of the note. The jury returned a verdict for $1,000.00, upon which judgment was entered, and a motion for a new trial was overruled by the trial judge. The Appellate Court properly held that, under the undisputed evidence, the plaintiff was entitled to $2,000.00 or nothing, and that the failure of the trial judge to grant a new trial constituted a patent and manifest abuse of his legal discretion.

In the case of **Paine v. Union Stock Yards Company, 28 Fed. (2d) 463 (8th Circuit)**, the plaintiff recovered a judgment, and thereafter defendant filed its motion for a new trial, attached to which were affidavits as to additional testimony which defendant sought to offer on a new trial. The trial court overruled the motion for a new trial with this explanation:

> "If a new trial should be had and the evidence contained in the affidavits were produced and believed by the triers of fact it would doubtless result in a substantial modification of the decision."

The trial court, in the course of its opinion incident to the overruling of the motion for a new trial, further said:

> "The Court is of the opinion that it has no power or right to grant a new trial under the circumstances

here involved and makes this statement so that the defendant may have the benefit thereof on review."

The defendants contended that the memorandum indicated that the trial judge refused to exercise his discretion to grant a new trial and that therefore the Appellate Court was justified in reviewing same. In the course of the opinion (l. c. 467) the Court said:

> "The granting of a new trial is, generally speaking, within the discretion of the trial judge, and, unless that discretion patently has been abused, his ruling on a motion for a new trial is not subject to review. It is not our view, however, that in this case the trial judge refused to exercise his discretion. * * * Clearly, however, the trial court by that language did not mean to intimate that absolutely it did not have the power to grant a new trial. * * * Perhaps the learned trial judge might have reached a different conclusion, and indeed it appears that he would have liked so to have done. But he did exercise his discretion, and his action is not to be reviewed here."

In 46 Corpus Juris 177 the rule of law is stated as follows:

> "Because the trial judge would have reached a conclusion different from that of the jury, nevertheless the trial judge may yield his own opinion to that of the jury."

In the case of **Reeve v. Dennett, 137 Mass. 315**, the Court said:

"The contention of the defendant that he was entitled as a matter of law to have a new trial upon the statement of the trial judge that he was of the opinion that the verdict was against the weight of the evidence cannot be sustained. A judge has a right to set aside a verdict which, in his opinion, is against the weight of the evidence. * * * To require him, as a matter of law, to set aside every verdict which, in his opinion, is against the weight of the evidence, would result practically in the trial of the facts by the Court instead of the jury."

In the case of **Hays v. Stine**, 289 Fed. 224 (4th Circuit), the Court held:

"Where the evidence was conflicting it would have been an abuse of judicial discretion for the trial judge to have set aside the verdict of the jury."

Again, in the case of **Yellow Cab Company v. Earle**, 275 Fed. 928 (8th Circuit) (certiorari denied 258 U. S. 624), the Court said:

"Denial of a motion for a new trial on the ground that the verdict is not justified by the evidence is discretionary with the trial court and not reviewable on appeal."

The same rule of law was followed in the case of **Ellerd v. Griffith, 29 Fed. (2d) 402 (9th Circuit).**

Also in the Sixth Circuit in the case of **Gajda v. Dairy Company, 18 Fed. (2d) 279,** the Court said:

"Neither the Appellate Court nor the trial judge can rightly pass on conflicting testimony or determine the credibility or preponderance thereof."

In **Weed v. Petroleum Company, 300 Fed. 1005** (see also 294 Fed. 725, same case), it was held:

"It is not sufficient ground for a new trial that the verdict is against the weight of the evidence or that the Court may have arrived at a different result."

Also in **Stewart v. Railroad Company, 229 Fed. 862**, l. c. 863, the Court said:

"I felt at the time the verdict was rendered that the plaintiff's claim as to how the injury occurred was the correct one and that the verdict should have been the other way; yet there was a conflict in the testimony * * * and while I think the finding was wrong I find nothing to justify me in granting a new trial."

See also **Pringle v. Guild, 119 Fed. 962**, holding to the same effect.

A unique situation arose in the case of **Spiro v. Felton, 78 Fed. 578 (6th Circuit)**, in which case it appeared that the trial judge refused to grant a new trial on the ground that the verdict was against the weight of the evidence, for the reason that he was not justified in law in so doing. The Appellate Court held that the trial judge did possess the power to grant a new trial on the ground that the

verdict was against the weight of the evidence, and reversed and remanded the case in the following language:

> "We find no error in the action of the Court during the trial and only remand the case for further proceedings from the point where the error occurred, leaving it to the trial court, upon consideration of the weight of the evidence, to grant the motion for a new trial or not as in its discretion it may deem proper."

Where the evidence is conflicting the trial judge possesses a certain discretion to substitute his judgment for that of the jury and to grant a new trial on the weight of the evidence; however, he is not obliged to exercise this discretion even though he may feel that the verdict is not as he would have rendered it had he been deciding the case on the facts. And so when it comes to the matter of the trial judge substituting his judgment on keenly disputed issues of fact, in lieu of the judgment of twelve impartial men, he should proceed with great caution and give consideration to the fact that possibly the jurors were right and he is wrong. We personally might feel that the decision of a jury is wrong and contrary to the way in which we personally might have decided the same case under the same evidence, but we cannot be absolutely sure that we are right and that the jury is wrong where the evidence is conflicting. The courts have held repeatedly that disputed questions of fact, the credibility of witnesses and the weight to be given to their testimony are questions for determination by a jury, and while the

right to supervise the conduct of a jury rests with a trial judge, this is a grave responsibility which should be carefully and cautiously exercised and only in exceptional cases should a trial judge feel justified in substituting his judgment for the verdict of a jury of twelve impartial men, particularly where the evidence is conflicting and where there is substantial evidence to support the jury's findings. To require a trial judge to grant a new trial in every case in which he personally feels that the verdict of the jury is not the same as his judgment were he deciding the facts, would be tantamount to abolishing the trial of the facts by jury, contrary to the Seventh Amendment, and so the Massachusetts Court said in the case of **Reeve v. Dennett, 137 Mass. 315:**

> "To require a trial judge, as a matter of law, to set aside every verdict which, in his opinion, is against the weight of the evidence, would result practically in the trial of the facts by the Court instead of the jury."

The right to grant a new trial on the weight of the evidence is a discretion vested in a trial judge to be exercised as his conscience may dictate, and while the trial judge in the instant case may have felt that the jury did not properly weigh the testimony of certain witnesses, nevertheless, unless the trial judge was able to convince himself that the jury was positively wrong and that he was absolutely right, he should, in the exercise of a sound

judicial discretion, refuse a motion for a new trial on the weight of the evidence (where the testimony is conflicting), even though, without such mature consideration, he might be prompted to say that the verdict of the jury was not in accordance with the weight of the evidence.

We respectfully submit that Judge Faris carefully considered his decision on the motion for a new trial and that having exercised a discretion on the highly disputed and conflicting evidence of record in this case this Court will not, and should not, condemn Judge Faris of abusing a discretion with which the law vests him.

The United States Circuit Court of Appeals, in its opinion, summed up this assignment of error in the following brief but forceful language:

> "This is not a case in which the lower court arbitrarily refused to consider the motion for a new trial, but it appears from the record that after very careful and thoughtful consideration of the motion the Court denied the same."

It was not incumbent upon Judge Faris, even though he felt, under the highly disputed and conflicting evidence in this case, that the verdict was not in accordance with his liking, and was, in his opinion, against the weight of the conflicting evidence, to sustain a motion for a new trial on the weight of the evidence, but this was a discretion which he possessed and could exer-

cise if he saw fit. Having decided not to exercise this discretion he cannot be charged with abusing the same, for, as hereinabove stated, to require every trial judge to grant a motion for a new trial, on the weight of the evidence, when he felt that the verdict was against the same, would be to impair the right of trial by jury contrary to the Seventh Amendment.

We respectfully submit that the overruling of petitioner's motion for a new trial was within the sound judicial discretion of the trial judge, and therefore is not reviewable by this Court.

Conclusion.

Feeling that this case was fairly and ably tried by District Judge Faris, that there was substantial evidence upon which the case was submitted to the jury, and that the denial of the motion for a new trial is not reviewable on appeal, we respectfully submit that the writ of certiorari should be quashed and the judgment rendered in the plaintiff's favor should be affirmed and sustained.

Respectfully submitted,

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Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 52.—October Term, 1931.

Southern Railway Company, Petitioner, vs. Edward Walters, a minor, by Herman Walters, his father and next friend.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 23, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

This action was instituted in a state court and removed to the District Court for Eastern Missouri. Respondent, the minor plaintiff, averred in his declaration, that as he was in the act of crossing defendant's track on Bond Avenue, East St. Louis, he was struck by a train and seriously injured. The negligence alleged was failure to sound a bell or other signal when the train was approaching the crossing, failure to maintain a proper and sufficient lookout, and failure to comply with an order of the Illinois Commerce Commission requiring defendant to stop all trains and flag the crossing before they crossed Bond Avenue. The answer was a general denial.

At the trial both parties presented proofs, and at the close of the plaintiff's case, as well as at the conclusion of all the evidence, the defendant moved for a binding direction, which was refused. The trial judge withdrew from the jury's consideration all the specifications of negligence except that which charged a failure to stop the train and flag the crossing before proceeding over Bond Avenue. He charged the jury that if these precautions were omitted the verdict should be for plaintiff, but if they were observed, they should find for defendant. The jury found for the plaintiff, and on appeal the Circuit Court of Appeals affirmed a judgment entered upon that verdict.[1] This Court granted certiorari.[2] We need consider only whether upon the whole case defendant was entitled to a binding direction.

[1] 47 F. (2d) 5.
[2] 283 U. S. 815.

The tracks on which the accident occurred extend from the railway company's main line to a freight yard and run approximately north and south, almost parallel with, and some seventy-five feet west of, Eighth Street. Bond Avenue, which extends eastwardly and westwardly, crosses the tracks at a right angle. The train involved in the accident consisted of a locomotive running tender-first and pulling fifty freight cars in a northerly direction from the freight yard towards the main tracks.

The plaintiff called four adult witnesses who were at the scene of the accident, none of whom saw its actual occurrence. Each of them was to the east of the train and each first noticed the plaintiff lying to the west of it after the locomotive and several cars had completely crossed Bond Avenue.

The plaintiff, who was between five and six years of age at the time of the accident, testified that he was about to cross the railroad tracks from west to east and was struck by the front of the locomotive. He stated repeatedly that the train was coming from the north, whereas it is beyond question that it was coming from the south; and he described the portion of the locomotive which struck him as the front end which had the cowcatcher and headlight on it, although it is beyond question that the tender was in front. He twice denied that he saw the train before he was struck, then said he saw it half a block distant when he was on the first track (there were three tracks at this point and the train was on the easternmost) and did not see it again until just as he was struck. He did not testify whether or not the train stopped.

A boy, nine years old at the date of the occurrence, who was standing near the crossing, deposed that several boys traversed the tracks before the train reached Bond Avenue, and that the plaintiff, following these boys, was hit by it and thrown back. He stated there was a box car in front of the locomotive, and that the car had passed before the plaintiff received his injury. He probably confused the tender with a box car, and his description of the accident would indicate that the plaintiff collided with the side of the locomotive near the cab.

A girl, who was ten years old at the time of the accident, testified that she saw the occurrence from the vestibule of a school house located south of Bond Avenue and west of the railroad tracks. She stated that she was able to see what happened by

looking through an aperture in a board fence caused by the falling down of a gate in the fence. The only gate to which her testimony could have referred was at a point so situated with reference to the crossing as to render it impossible for one standing where she was to see the crossing through the gateway. She says the locomotive struck the plaintiff, but does not say what part of it came into contact with him. She also states that the train did not stop before entering upon the crossing.

Only one of the adult witnesses stated the train did not come to a stop. She was a passenger in an automobile, travelling west on Bond Avenue, which was held up by the passing train. This testimony was shown to have no adequate foundation by her admission that when she first noticed the train the locomotive and several cars had crossed Bond Avenue.

It is argued that it may be inferred from the speed of the train when some of the witnesses observed it crossing other streets as well as Bond Avenue, and from a guess of the engineer as to the time required to get up such speed after a full stop, that none could have been made at Bond Avenue. But the argument amounts to mere speculation in view of the limited scope of the witnesses' observation, the down grade of the railway tracks at the point, and the time element involved. (Compare *C. M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472.) Five witnesses for defendant testified that a full stop was made and the crossing flagged, and that no one was hit by the rear of the tender, which was the front of the train.

An examination of the record requires the conclusion that the evidence on the issue whether the train was stopped before crossing Bond Avenue was so insubstantial and insufficient that it did not justify a submission of that issue to the jury. *Gulf M. & N. R. Co.* v. *Wells*, 275 U. S. 455; *Kansas C. S. Ry. Co.* v. *Jones*, 276 U. S. 303; *N. Y. Central R. R.* v. *Ambrose*, 280 U. S. 486; *Gunning* v. *Cooley*, 281 U. S. 90, 93; *A. T. & S. F. Ry. Co.* v. *Toops*, 281 U. S. 351.

There is no proof whatever that the alleged failure to stop before entering the crossing was the proximate cause of the plaintiff's injury. Such direct testimony as there is on his behalf indicates a collision between him and the side of the train after the front part of it, which in this case was the rear end of the tender,

had passed him; and all of the evidence both for plaintiff and for defendant is consistent with this view of what happened. It is clear that on this ground also a binding direction in favor of the defendant should have been given.

The judgment is reversed and the case remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice STONE took no part in the consideration or decision of this case.

A true copy,

Test:

Clerk, Supreme Court, U. S.

END OF CASE